TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~215~~ 25.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

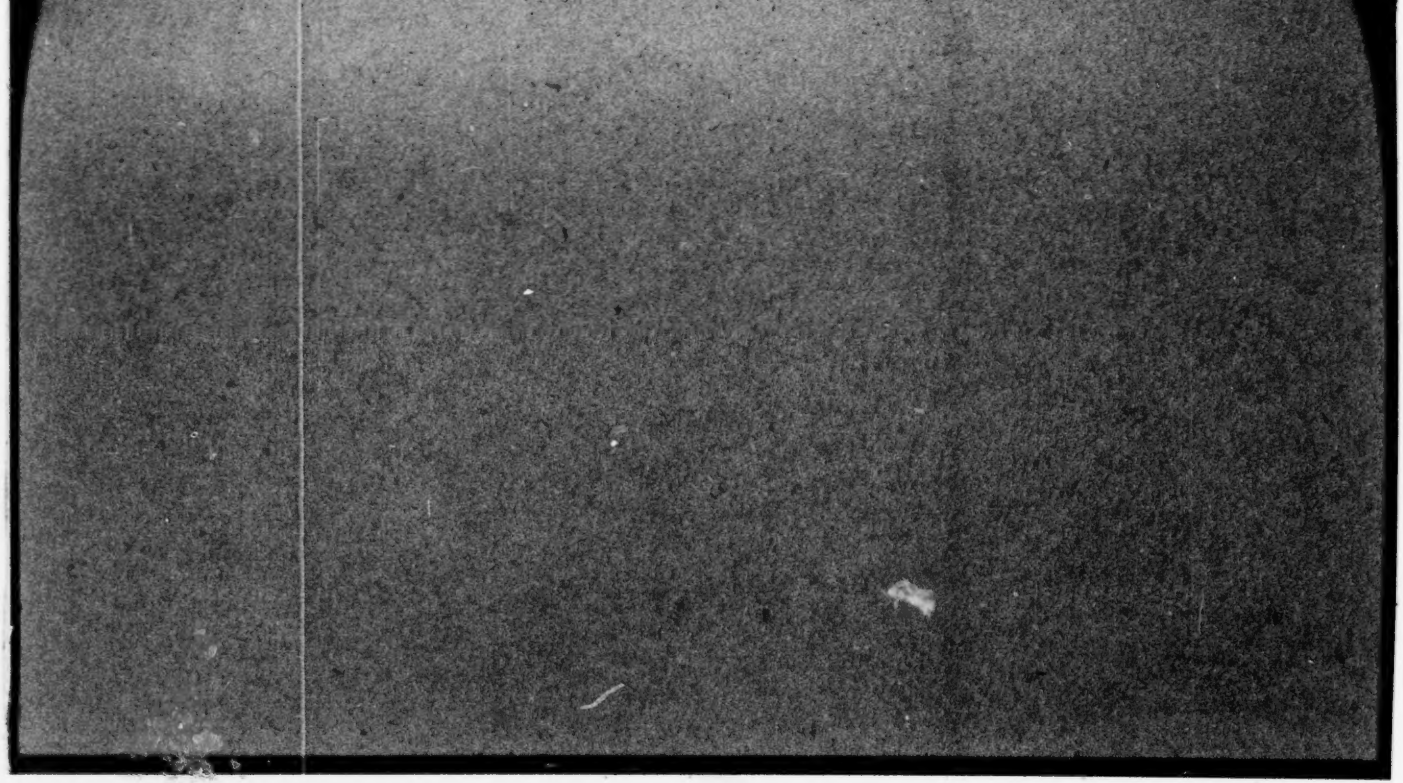
vs.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED MAY 23, 1905.

(19,771.)



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1 THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
versus
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } No. 597. In Equity.

2 Caption.

Be it remembered, that at a term of the United States court, in the fifth circuit thereof, and in the northern district of Texas, begun and holden at Dallas, Texas, on January 9th, 1905 and which term adjourned on the 4th day of March A. D. 1905, the Honorable Edward R. Meek United States district judge for the northern district of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
versus
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clarke, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } No. 597. In Equity.

3 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. —. The Plaintiff's Bill.

To the honorable the judges of the circuit court of the United States for the northern district of Texas.

1.

The Fidelity Mutual Life Insurance Company, of Philadelphia county, Pennsylvania, and a citizen of the State of Pennsylvania, brings this its bill against Jennie M. Smythe and James N. Smythe, her husband, both of Licking county, Ohio, and both citizens of the State of Ohio, and William H. Clark and Charles A. Culberson, both of Dallas county, Texas, and both citizens of the State of

Texas, and Morris A. Spoonts, of Tarrant county, Texas, and a citizen of the State of Texas, and Phillips Investment Company, of Jackson county Missouri, and a citizen of the State of Missouri. And thereupon your orator complains and says:

2.

The plaintiff is a private corporation which long prior to the year 1896 was duly incorporated by the State of Pennsylvauia under the name of the Fidelity Mutual Life Association of Philadelphia, and which on to-wit, August 22, 1899, by amendment of its charter changed its name to the Fidelity Mutual Life Insurance Company, without, however, in any way losing its identity. Ever since a date anterior to the year 1896, the plaintiff has been transacting a life insurance business in the State of Texas by authority of said State.

The defendant Jennie M. Smythe, was married to the de-
4 fendant, James N. Smythe on or about March 26, 1903. Continuously from a date prior to October, 1896 until her said marriage she was a widow and was named Jennie M. Mettler. The defendant Phillips Investment Company, is a private corporation duly incorporated by the State of Missouri long prior to October 29, 1901.

3.

In the latter part of October, 1896, one William A. Hunter, a brother of the defendant, Jennie M. Smythe, and then residing with her in Reeves county, Texas visited the Texas office of the plaintiff in the city of Dallas, and there renewed an old acquaintance with the plaintiff's general agent Andrew J. Brown. He told said general agent that he was a farmer and real estate dealer; that he and his brother-in-law had purchased a considerable amount of land in the Pecos valley, and owed a good deal of money on the same; that his brother-in-law had died; that if he should die his sister, the said defendant, would lose what they had paid; that for this reason he thought of taking insurance upon his life in order that his said sister might be able to pay the amount owing upon the land if he should die. Said statements were materially false and were made to deceive said general agent, and did deceive him and lead him, and through him the plaintiff, to believe that the said Hunter had a legitimate reason for procuring upon his life a considerable amount of insurance in favor of his said sister.

In pretended pursuance of said purpose, the said William A. Hunter, on, to-wit October 28, 1896 made written application to the plaintiff through its said general agent, for three policies of insurance upon his life, each to be of the sum of five thousand dollars, and all to be payable to his said sister. The plaintiff accepted his proposition so made, and under date of October 31, 1896, issued to him its three policies numbered respectively D-73372, D-73373, and D-73374. By each of said policies the plaintiff promised that, subject to certain conditions not relevant to the present bill, within

ninety days after its acceptance of due and satisfactory proof
5 of the death of said William A. Hunter, it would pay to his said sister, Jennie M. Mettler, now the defendant, Jennie M. Smythe the sum of five thousand dollars if she should survive him. On to-wit November 7, 1896, the plaintiff, through its said general agent, delivered said policies to said William A. Hunter and received from him the first semi-annual premium thereon, amounting to ninety-seven and 65/100 dollars.

4.

On to-wit Dece[illegible] 1896, said William A. Hunter left the residence of the defendant, Jennie M. Smythe in the town of Pecos, Texas, ostensibly to go for a trip of a week or ten days to a place in Loving county, Texas, about forty miles from Pecos. He took with him two horses, a wagon, camping utensils, and provisions for himself and team. After crossing the Pecos river near the town of Pecos and travelling for a distance of about fourteen or fifteen miles along the public highway leading to said point in Loving county, he left said highway and drove off through a thicket a distance of about half a mile to a point near the east bank of the Pecos river. There he pitched a camp, and so arranged his bed, camp fire, camping utensils, food and other provisions as to indicate that he had camped there over night. He removed the harness from the horses and left it lying on the ground near the wagon, and tying one horse to a tree left it so that it should afterwards be found dead with the appearance of having perished from starvation. He then walked down to and over the upper edge of the deep bank of the river, leaving his foot steps plainly imprinted in the sand, and carefully made his way thence without leaving any trail, so that it should appear to any one examining the camp that he had fallen into the river and been drowned. The other horse was found soon thereafter in the town of Barstow, a station on the Texas and Pacific railway, whither, as the plaintiff verily believes, he had ridden it on the night of December 3, 1896, turning it loose near said town with no accoutrement save a dangling rope, so that it should appear to have strayed from the camp.

Immediately after stealing away from his camp as aforesaid, Wil-
liam A. Hunter went into hiding, quitting the State of Texas,
6 assuming a fictitious name, and ever thereafter concealing himself so that he should not be found by the plaintiff, and so that the plaintiff and the public should not know that he was still alive, but should believe that he was drowned in the Pecos river on the morning of December 4, 1896.

All this he did with the intent and purpose that his said sister, the defendant, Jennie M. Smythe, should represent to the plaintiff that he had been so drowned, and should make demand upon the plaintiff for the sum of fifteen thousand dollars in payment of its said policies, and should so deceive the plaintiff as to cause it to pay her said sum of money in the belief that he had been so drowned

and with the further intent and purpose that, if it should decline to pay the same, she should so impose upon and deceive the courts, and the judges and juries composing the courts, that they should believe he had been so drowned, and should compel the plaintiff to pay said sum together with all the interest, penalties, and costs to accrue thereon; and with the further intent and purpose that when she should have collected the proceeds of said policies the same should be divided between her and himself to the dishonest enrichment of them both.

Within the last few days the plaintiff has for the first time learned numerous facts and circumstances which give it strong reason to believe, and verily it does believe, that said William A. Hunter and his sister, the defendant, Jennie M. Smythe, conspired together from the beginning, and concocted together this entire scheme of fraud, and that every step therein taken, from the first visit of said Hunter to the plaintiff's office in Dallas to the final collection and division of the money, was taken in pursuance of their mutual understanding and agreement.

5.

Thereafter, in or about the month of January, 1897, in pursuance of said fraudulent plan, and in ratification and adoption thereof, the defendant, Jennie M. Smythe, presented to the plaintiff her
7 affidavit in due and regular form, as required by said three policies, showing that said William A. Hunter had died by drowning in said Pecos river on or about December 4, 1896, and made demand upon the plaintiff that it pay to her the sum of fifteen thousand dollars as and for the amount which his death had rendered due from it to her upon account of said three policies. Not being satisfied that said Hunter was dead, the plaintiff refused to make such payment.

Thereupon, on to-wit December 2, 1898, the said defendant, Jennie M. Smythe (whose name then was Jennie M. Mettler) instituted in the district court of Dallas county for the forty-fourth judicial district of Texas, against the plaintiff (whose name then was the Fidelity Mutual Life Association of Philadelphia) a suit in the nature of an action at law to recover from it upon account of said policies said sum of fifteen thousand dollars, together with interest, damages, and costs. On to-wit January 4, 1898, said suit was by the order of said district court duly removed to the circuit court of the United States for the northern district of Texas, sitting at Dallas. There it remained for trial, being numbered 2118 upon the law docket of said court and entitled Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia.

Said action was tried on May 28, 1900, and several succeeding days, on the following named pleadings, to-wit: The plaintiff's first amended original petition, filed November 11, 1899, the defendant's second amended original answer, filed May 28, 1900, and the plaintiff's amended first supplemental petition and defendant's supple-

mental answer, both filed May 28, 1900. A substantially correct copy of said pleadings, marked Exhibit A, is attached to and hereby made a part of this bill. In her said first amended original petition, the plaintiff alleged that the said William A. Hunter died on or about the fourth day of December, 1896; and it its said second amended original answer, the defendant denied said allegation. The issue of fact so made was vital to the plaintiff's right of re-
8 covery, formed the principal subject of controversy at said trial, and was the only issue pertinent to this bill.

In support of her said allegation, the plaintiff in said action (here a defendant) introduced witnesses who gave a detailed account of the appearance of the camp arranged by William A Hunter, as briefly set forth in section 4 of this bill. She herself also as a witness described said camp, and recounted the circumstances attending the departure of Hunter from Pecos, her institution of a search for him, and her discovery of the policies sued upon, all in such a way as to lead the court, and especially the jury, to believe that said Hunter had in fact been accidentally drowned in the Pecos river on the morning of December 4, 1896. She, also, on or about December 30, 1896, wrote a letter to her father in Ohio, stating that said William A. Hunter had been drowned, and relating the circumstances tending to establish that fact as above mentioned; and so she created a family reputation that he had been drowned in the Pecos river on December 4, 1896. At said trial she introduced the depositions of several members of the family proving the existence of such a family reputation, and herself testified to its existence.

The only evidence produced at said trial tending to establish as a fact the death of William A. Hunter was the evidence of the circumstances connected with his disappearance, the evidence of the family reputation that he was dead, and the fact that during the period of more than three years elapsing between his disappearance and said trial the defendant company had been unable to procure any direct and positive proof which the jury deemed worthy of credit that he had not died as alleged. But said family reputation was based entirely upon said circumstances and the statement thereof made by the plaintiff herself to the other members of the family. And said circumstances in turn, each and all, were manufactured by said Hunter, with deliberate and carefully planned design of deceiving the defendant company, and deceiving the courts, and by means
9 of such deceit swindling the defendant company out of the sum of fifteen thousand dollars or more for his own benefit and that of his sister. The inability of the defendant company to procure convincing evidence of the fact that said Hunter had not been drowned but was still living was due solely to the studious care with which said fact was concealed by him, and as the plaintiff verily believes by her as well.

The plaintiff has much reason to believe, and verily it does believe, that the defendant, Jennie M. Smythe, knew at all times that her brother, the said William A. Hunter, was not dead; and that

she knew where he was and maintained a regular correspondence with him at all times during the pendency of said litigation; and that she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff; and that both by deliberate concealment and by direct perjury she withheld from the court the true facts as the same were known to her, and prevented the plaintiff from procuring evidence to establish its defense.

Said trial resulted on June 2, 1900, in a verdict of the jury in favor of the plaintiff, procured from it by her solely by means of the frauds aforesaid. Upon said verdict, after the allowance of a remittitur of three thousand three hundred and seventy-five dollars, a judgment was, on July 4, 1900, duly entered by said circuit court that the plaintiff (here the defendant, Jennie M. Smythe) recover from the defendant (here the plaintiff) the sum of twenty-one thousand five hundred fifty dollars, together with interest thereon at the rate of six per centum per annum from and after said date, and all her costs of suit, and that she have execution therefor. Said sum was made up of fifteen thousand dollars allowed as the face of said three policies of insurance, two thousand one hundred fifty dollars allowed as legal interest thereon, and four thousand three hundred dollars allowed as attorney's fees and damages, which in the exercise of its inscrutable wisdom the legislature of Texas had imposed upon the defendant company for failing to pay the plaintiff's claim promptly.

After the return of said verdict and before the entry of final judgment thereon, the defendant company filed a motion and an amended motion for a new trial of said cause; both of which motions were overruled by the court on June 25, 1900. Thereafter the defendant sued out a writ of error for the revision of said judgment by the Supreme Court of the United States. Said cause was heard by said Supreme Court as No. 165 of its October term, 1901, and on May 5, 1902, the judgment of the circuit court was in all things affirmed by the Supreme Court.

Thereafter, on to-wit June 3, 1902, the defendant company (here the plaintiff) paid into the registry of said circuit court the sum of twenty-four thousand twenty-eight and 25/100 dollars, being the principal sum of said judgment with all interest thereon accrued; and said sum was by the clerk of said circuit court on the said date paid to and distributed among the plaintiff in said cause and her assigns as hereinafter set forth. In addition to said sum the defendant company made sundry payments of accruing costs from time to time during the pendency of said litigation, and soon after its conclusion; and so it has fully discharged said judgment with all the costs of court, amounting to about one thousand five hundred dollars.

6.

On to wit June 10, 1899, the defendant, Jennie M. Smythe, (then Jennie M. Mettler, the plaintiff in said action at law) by a written

instrument assigned and transferred to William L. Hall and the firm of Alexander, Clark & Thompson an interest in her said claim against the present plaintiff to the extent of one-third of the amount recovered for principal, interest and statutory damages, plus two thousand five hundred dollars, plus any amount recovered for attorneys' fees. Said assignment was made as a part of a contract of employment, and to compensate the assignees for professional services rendered and to be rendered to the assignor in prosecuting her said claim against the present plaintiff, all the assignees being lawyers by profession, and being her attorneys in said litigation.

11 In said written instrument it was further stipulated that the assignees might employ such associate attorneys as they should deem necessary, but only at their own expense for the fees of such associate attorneys.

Said firm of Alexander, Clark & Thompson was composed of William M. Alexander, William Thompson, and the defendant, William H. Clark. On to-wit May 29, 1902, said William M. Alexander, William Thompson and William L. Hall by a written instrument assigned and transferred to the defendant William H. Clark, all their interest in said contract of employment and in the judgment hereinbefore described.

In the meantime, the defendants, Morris A. Spoonts and Charles A. Culberson, had been employed as associate attorneys under the provisions of said contract, and as such had rendered professional services in said litigation. As compensation for the services by them severally rendered, the defendant, William H. Clark, assigned and transferred to the defendant, Morris A. Spoonts, an interest of one thousand five hundred dollars, and to the defendant, Charles A. Culberson, an interest of one thousand twenty-six dollars, in his share of the money paid into court by the present plaintiff as aforesaid.

On to-wit October 29, 1901, the defendant, William H. Clark, being indebted to the defendant, Phillips Investment Company, upon his promissory note for the principal sum of one thousand four hundred seventy-one and 57/100 dollars, by a written instrument assigned and transferred to said Phillips Investment Company, as collateral security for said note, his entire interest in the said judgment.

In pursuance of said transfers, the clerk of said circuit court on to-wit June 3, 1902, paid out as follows the said sum of twenty-four thousand twenty-eight and 25/100 dollars, which the present plaintiff had deposited in court to discharge said judgment as above set forth. He paid to the defendant, William H. Clark, the sum of eight thousand three hundred forty-six dollars; to the defendant Morris A. Spoonts, the sum of one thousand five hundred dollars; to the defendant, Charles A. Culberson, the sum of one

12 thousand twenty-six dollars; to the defendant, Phillips Investment Company, the sum of one thousand five hundred forty and 25/100 dollars; and to the defendant, Jennie M. Smythe,

through William H. Clark, as her attorney of record, the remaining sum of eleven thousand six hundred sixteen dollars. No one of the defendants ever has returned to the plaintiff, directly or indirectly, any portion of the money so received by him, but each has converted to his own use the entire sum paid to him:—saving, however, that the defendant, Jennie M. Smythe, as the plaintiff has strong reason to believe, and verily does believe, has paid over to her said brother and co-conspirator, William A. Hunter, a large portion of the money so received by her.

7.

The said William A. Hunter was not drowned on December 4, 1896, as alleged and found by the jury in said action at law; but he still lives. At the date of filing this bill he is confined in the jail of Jefferson county, Alabama, by virtue of a warrant issued by the governor of Alabama for his arrest and surrender to the extradition agent of the State of Texas, to be tried in Texas upon a charge of swindling this plaintiff in the manner hereinbefore set out. He is so confined pending an appeal by him taken to the supreme court of Alabama from an order of the trial court refusing to discharge him upon a writ of *habeas corpus*. The fact that he still lives forms a complete and absolute defense to the action brought by the defendant, Jennie M. Smythe, against the plaintiff, in which said judgment was rendered.

Said fact was not discovered by the plaintiff, and was not known to the plaintiff or to any of its officers, attorneys, or agents, until April 27, 1903, ten months after said judgment had been rendered, affirmed, and fully paid and discharged. On April 27, 1903, the said William A. Hunter was found living under an assumed name in the State of Alabama, by one R. C. Milliken, who had for years been employed by the plaintiff in searching for him or for evidence that he had not died as alleged. Immediately after the dis-
13 appearance of said William A. Hunter was announced in December, 1896, the plaintiff, believing that he had not been drowned as alleged, instituted a search for him or for proof that he was still living. Said search was thereafter continuously and diligently prosecuted by it during the entire time of the pendency of said litigation, at an expense of thousands of dollars, and by the use of all the resources at its command. But said search was constantly thwarted and rendered unavailing by the cunning deceits and concealments of said William A. Hunter, which he continually practiced in his own interest and that of his said sister, the defendant, Jennie M. Smythe, throughout the whole period of the pendency of said litigation and even after its termination. All of said deceits and concealments made in her behalf were adopted and ratified by said defendant, Jennie M. Smythe, and, as the plaintiff verily believes, were supported and aided also by her own acts of wilful deceit, concealment and perjury, all as hereinbefore set out. And so the plaintiff was prevented from having a fair trial of said

action at law, and was prevented from procuring the evidence required to establish its defense in said action, that is to say, to establish the simple fact that said William A. Hunter was not dead.

8.

To the end, therefore, that your orator may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court:—

1. That each and all of the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, be restrained by the injunction of this honorable court from in any way making use of the aforesaid judgment, and especially from ever setting up said judgment by answer, plea or demurrer as an adjudication that said William A. Hunter died in December, 1896, or as an adjudi-
14 cation that the plaintiff ever was indebted to them or any of them upon account of said three policies of insurance, or as tending in any way to justify them or any of them in receiving and converting to their own use the plaintiff's money paid to them severally as hereinbefore set out.

2. That each of said defendants, Jennie M. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company be decreed to repay to the plaintiffs the sum of its money received by him as aforesaid, with legal interest thereon.

3. That your orator may have such further or other relief in the premises as the nature of the circumstances of the case may require.

9.

May it please your honor to grant to your orator a writ of subpœna, to be directed to the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts and Phillips Investment Company, thereby commanding them and each of them at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

MAURICE E. LOCKE,
Solicitor and Counsel for Plaintiff.

THE STATE OF TEXAS,
County of Dallas.

Andrew J. Brown, being first duly sworn, makes oath and says: I am general agent for Texas of The Fidelity Mutual Life Insur-

ance Company, the plaintiff in the foregoing bill. The allegations of said bill are true, except such as are made upon information and belief, and them I verily believe to be true.

15 ANDREW J. BROWN.

Sworn to and subscribed by Andrew J. Brown before me, this the 19th day of May, A. D. 1903.

[SEAL.] B. E. JULIAN,
Notary Public, Dallas County, Texas.

EXHIBIT A.

Plaintiff's First Amended Original Petition.

Filed November 11, 1899.

In the U. S. Court for the Northern District of Texas, at Dallas.

MRS. JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. } #2118.

Now comes the plaintiff, Jennie M. Mettler, by attorneys, in the above-entitled cause, and, with leave of the court first had and obtained, files this her first amended original petition in lieu and in substitution of her original petition filed herein on the 2nd day of December, 1897, and for cause of action alleges as follows:

1. Plaintiff complains of the Fidelity Mutual Life Association of Philadelphia, and respectfully shows to the court that she is a *femme sole*, and is a resident citizen of Reeves county, Texas, and that the defendant, The Fidelity Mutual Life Association of Philadelphia, is a corporation duly and legally incorporated under and by virtue of the laws of the State of Pennsylvania, with its principal office and locus in the city of Philadelphia, aforesaid, and that said defendant association has a permit to do business in the State of Texas; that it is now, and has been since the 28th day of October, 1896, and for a long time prior thereto, engaged in the business of life insurance in the State of Texas under and by virtue of the laws thereof, with its State agent in the city of Dallas, Dallas county, Texas, to wit, A. J. Brown, who has an office in the city of Dallas, from which office he conducts the business of said association in the State of Texas.

16 2. That heretofore, to wit, on the 28th day of October, 1896, plaintiff's brother, William A. Hunter, did make his three written applications to the defendant through its said State agent, A. J. Brown, who solicited said insurance, for $15,000.00 insurance on his life, each application being for the sum of $5,000.00, and

being made upon the printed forms prescribed by and used by said defendant, which applications are in the possession of the defendant, and it is here notified to produce the same upon the trial of this cause or secondary evidence thereof will be introduced by the plaintiff.

That on said 28th day of October, 1896, and prior thereto, plaintiff was a widow, and that her said brother, William A. Hunter, was a single man, never having been married; that their home was at Pecos, Texas, and that her said brother made said three applications for insurance for her benefit.

3. Plaintiff alleges that on the 31st day of October, 1896, and prior thereto, she and her said brother were residents of Reeves county, Texas, as aforesaid, and that the defendant, The Fidelity Mutual Life Association of Philadelphia, on said day, in consideration of the three several sums of $32.55 each, paid by the said William A. Hunter to the defendant, and of the further three several sums of $32.55 each, to be paid to it semi-annually upon the 28th day of the months of April and October in every year for a period of ten years from October 28th, 1896, made, executed and delivered to the said William A. Hunter its three several policies of insurance in writing, numbered, respectively, D–73372, D–73373 and D–73374, wherein it insured the life of William A. Hunter in the sum of $15,000.00—that is, $5,000.00 by each policy—for the benefit of the plaintiff, and promised to pay said $15,000.00 to plaintiff on the death of the said William A. Hunter, upon the surrender of said policies properly receipted, within ninety days after the acceptance of due and satisfactory proof of the death of the said William A. Hunter.

4. That the said William A. Hunter died on or about the 4th day of December, 1896; that the plaintiff duly notified the de-
17 fendant, in writing, of his death, and the defendant is requested to produce said notice upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff upon the hearing hereof; that the plaintiff did thereafter, on or about the — day of January, 1897, promptly furnish to the defendant due and satisfactory proof, at its home office in the city of Philadelphia, of the death of her brother, the said William A. Hunter, and of the just and lawful claim, both as to plaintiff's rights and interest and the justness of the claim, in accordance with the provisions of said policies, and offered to surrender said policies, when properly receipted, when the same were paid; that the defendant received said proofs of death, and accepted the same, and retained the same for more than said ninety days, making no complaint that the same were not due and satisfactory proof; and plaintiff shows that said proofs of death are in the possession of the defendant, and it is here given notice, as it has been heretofore in writing, to produce said proofs of death upon the trial of this cause, or secondary evidence thereof will be introduced by her.

That at the time of the death of the said William A. Hunter, as

aforesaid, the premiums due upon said policies had been paid and the said William A. Hunter had, in all respects, complied with the conditions and provisions of said policies, whereby the defendant became liable and promised to pay to the plaintiffs, according to the provisions of said policies, said sums of money therein specified, and yet the defendant wholly failed and refused to pay said policies within ninety days after accepting said proofs, as it agreed in its policies so to do, and, though often requested, has never paid the same or any part thereof.

Plaintiff avers that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos river, being drowned near what is known as the "Texas bend" in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves county,
18 Texas, to Mentone, in Loving county, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered.

5. That upon receiving from plaintiff, as aforesaid, notices of the death of the said William A. Hunter, it was the duty of the defendant, according to the terms of its said policies, to furnish plaintiff blank forms for proof of death and claim, it being usual for life insurance companies to furnish same, and it being provided by said policies that plaintiff should make said proof of death and claim upon such blank forms, proper blank forms to be furnished by the said defendant, as aforesaid.

Plaintiff shows that the defendant, upon receiving said notice of the death of her brother, sent its general agent, representative and adjuster, R. C. Milliken, to Pecos, Texas, with printed blank forms for proof, to furnish plaintiff said forms and to receive the proof when executed; that the said R. C. Milliken, for the defendant, came to Pecos in response to said notice, saw plaintiff, who was a widow, without a male relative in Texas, and wholly ignorant as to how to make out said proof of death and claim, and represented to her that he would advise her of the necessary requirements of and information to be embraced in her said proof of death and claim, and aid her in making out the same. Plaintiff avers that knowing her own ignorance in reference thereto, and having been induced to believe by the said R. C. Milliken that he would act in the best of good faith in the matter, plaintiff, at his request gave him full information in reference to said William A. Hunter leaving Pecos and being drowned in the Pecos river, and of where he had spent his life, and in what business, and information where he could obtain his latest photograph, and gave him full data in reference to the names and address of his father, brothers, sisters—that is, full information of the family—and where and in what business they had spent their lives, all of which said R. C. Milliken stated was necessary because the body of William A. Hunter was not found; that said R. C. Milliken, having been advised, as aforesaid, him-
19 self wrote out the answers to the questions in said blank proofs of death and filled out all blanks therein, representing

to the plaintiff that he had written all necessary matters therein, and plaintiff, believing the same to be true and relying upon the said representations, as requested, signed and made oath to same before J. B. Gibson, of Pecos, district clerk in and for Reeves county, said Milliken having selected said officer to administer said oath, and on the same day delivered the same to him, the said R. C. Milliken, he being duly authorized by the defendant to receive the same, and the same he promptly furnished the defendant at its home office, and the same is now in the possession of the defendant, and it is given notice to produce the same upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff.

Plaintiff shows that about the day after and the secon- and third days after receiving said "proofs of death" said R. C. Milliken called to see plaintiff with typewritten questions, also in reference to the death of William A. Hunter, and then and there prepared and wrote her answers thereto, and had her sign and make oath thereto before said officer, J. B. Gibson, and received the same, stating to plaintiff that the printed form was not sufficient, and that said affidavits were necessary in the making of the proofs of the death of William A. Hunter, of which affidavits and the contents thereof the said Milliken promptly advised the defendant, and furnished the same to the home office of the defendant.

Plaintiff avers that after the proofs of death and accompanying affidavits were prepared and executed, as aforesaid, the said R. C. Milliken then and there received and accepted the same at Pecos, Texas, for the defendant, as he was sent to Pecos with authority to do, without an intimation that they were not satisfactory, but to the contrary, he led plaintiff to believe that the same were satisfactory, and that the said policies would be paid; all of which was done with the full knowledge, consent and approval of the defendant company.

20 Plaintiff avers that, in addition to her proof of death and claim made and delivered to R. C. Millikem, as aforesaid, and as a part thereof, at the special instance and request of the defendant, made by and through its agent and representative, Abb Landis, defendant was furnished, on or about the — day of January, 1897, a letter containing a full written statement in reference to the death of her brother, written by the plaintiff to her father, W. A. Hunter, of Homer, Ohio, on December 30, 1896, and obtained by the defendant on the day and year aforesaid, at his home office in Philadelphia.

Plaintiff says that if her said proof of death and claim are not satisfactory, as pleaded in defendant's answer herein, which she denies, it is because of the fraud and deceit aforesaid of the said R. C. Milliken in the preparation of the same.

Plaintiff avers that the defendant adopted and ratified the acts, representations, statements, promises and conduct of the said Milliken, and is bound thereby.

Plaintiff shows that on account of the fact that no one saw said

deceased, William A. Hunter, when he was drowned, or his body thereafter, his body never being recovered or buried, it was impossible for plaintiff to furnish to the defendant other facts for proof of death than she did, as aforesaid, which plaintiff avers were reasonably sufficient and should be satisfactory to the defendant; that the defendant refused to pay said policies because it claimed that said William A. Hunter was not drowned, thereby relieving plaintiff from the duty of making any other or further proof than that which was submitted to the defendant by plaintiff; that the defendant still insists that the said Hunter is alive; and sets up the same as one of the defenses in its answer filed herein; that defendant's said agent, and through him the defendant, was fully advised of all the facts and evidence upon which plaintiff relied to establish the death of her said brother; that all of the proofs of said loss were, as aforesaid, gotten up and prepared by said agent; that if they are
21 not sufficiently full or omitted anything necessary it was on account of the failure and fraud of said agent; that as defendant refused to pay said policies without direct evidence of the death of the said William A. Hunter, and the manner of his death made it impossible to produce that character of proof, it became impossible for her to furnish proof satisfactory to defendant, though, as aforesaid, the proof so made was and should be held, under the circumstances of this case, sufficient to meet the terms of said policies requiring plaintiff to furnish proof of the death of her said brother.

Plaintiff further says that on account of the acts and conduct of the said R. C. Milliken and defendant's other agents and officers, pretending that defendant was so strongly convinced of the fact that said assured was not dead, that no proofs which she could submit would in anywise change defendant's determination not to pay said policies; that by reason thereof, in justice and right, defendant should now be estopped from attacking the sufficiency of said proof of death and should not now be permitted to interpose the same as a defense herein.

6. Plaintiff avers that the defenda-t is estopped from asserting that her proof of death and claim is not satisfactory, for the reason that after it was furnished to the defendant, as aforesaid, and the surrender of the policies, properly receipted, offered by plaintiff upon the payment thereof, defendant in nowise notified plaintiff that the same was not satisfactory within ninety days thereafter, nor within any reasonable time, and the policies became then and there, to wit, ninety days after said proof was furnished to defendant, due and payable, and defendant is now estopped from denying the sufficiency of said proof, having received and accepted the same without notifying the plaintiff within the time required by said policies that the same were not satisfactory.

7. Plaintiff further says that the defendant has waived proof of death and claim of any character whatsoever by denying any
22 liability on said policies, for that on or about the day after receiving said proof of death and affidavits, as aforesaid, the

defendant did, by and through its said representative, R. C. Milliken, acting for the defendant in the usual scope of his duties and with authority, state to the plaintiff, at Pecos, Texas, in substance, that he had only been pretending to believe that William A. Hunter was dead; that he was not dead; that defendant would find him in a few days, and plaintiff states that while this conversation was going on the telegraph messenger called at the house and asked if said Milliken was there, and gave him a telegram, which, after reading, said Milliken handed to plaintiff, requesting her to read the same. The telegram was sent from defendant's State agency of office at Dallas, Texas, and was signed by one of defendant's representatives, whose name plaintiff cannot recall; and the substance of the telegram was that William A. Hunter had been found and arrested and would be brought at once to Pecos; that said R. C. Milliken urged if plaintiff would cancel and surrender said policies before her brother was turned over to the sheriff at Pecos that he, the said Milliken, would protect him and her from criminal prosecution.

Plaintiff shows that said telegram was false and fraudulent and together with the language of the defendant's representative, Milliken, constituted not only a denial of any liability whatever, but an attempt on defendant's part to coerce, scare, and frighten plaintiff into admitting defendant was not liable and relieving it from liability by cancelling and surrendering said policies, all of which facts plaintiff is ready to verify, and pleads the same as a complete waiver of any proof of death and claim whatsoever; and plaintiff gives the defendant notice, as it has heretofore done, to produce said telegram upon the trial of this cause, or secondary evidence thereof will be made.

8. Plaintiff shows that, upon receipt of said notice of the death of William A. Hunter, defendant's general agent and adjuster, R. C. Milliken, came to Texas and made a personal examination of
23 and into all the facts and circumstances in reference to the death of said William A. Hunter, and though the same were amply sufficient to satisfy any reasonable person that W. A. Huntee was, as plaintiff had notified defendant, dead, he had said telegram sent to himself and sho-ed the same to plaintiff, and by the false and deceitful means aforesaid endeavored to frighten plaintiff into cancelling and surrendering to him said policies and releasing his company from its liability, and denied any liability whatever on the part of defendant; of which conduct the defendant was promptly advised by their said representative, and, instead of repudiating the same defendant has acted upon the same and ratified the same, whereby defendant waived said preliminary proofs of death and should not now be heard to say that it is not liable upon its said policies because said proofs of death furnished by plaintiff, as aforesaid, are not satisfactory to it.

9. Plaintiff shows that defendant has wrongfully failed and refused and still fails and refuses to pay said policies or any part thereof, though often requested so to do, to plaintiff's damage $21,697.60.

Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest, and damages due plaintiff by defendant on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon defendant for failing to pay the loss within the time specified in the policies was first enacted by the legislature of Texas on May 3rd, 1874; it was carried into the Revised
24 Statutes of 1879, and again into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be valid. Plaintiff shows that the policies sued on were issued October 31st, 1896, after said statute of 1895 went into effect; that the defendant, as a foreign corporation, was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed and was when it issued said policies obliged to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas, whereby it became bound and is liable to plaintiff for said twelve per cent. damages and reasonable attorneys' fees. Plaintiff shows that it appeared to the legislative mind of the State of Texas that the life-insurance business, as conducted and carried on in the State by such corporations, was detrimental to the welfare of its people, and, as the State had a right to do by the exercise of its police power, it prescribed said provisions of the law of 1895 as a part of defendant's contract herein, whereby defendant became bound and liable to plaintiff for said twelve per cent. damages and attorneys' fees.

Wherefore plaintiff prays that on a hearing hereof, the defendant having already been cited, that she have judgment for $15,000.00, the face of said policies, with legal interest thereon, together with twelve per cent. damages thereon, and reasonable attorneys' fees, namely ten per cent. of the amount recovered; for all costs of suit, and for such other and further relief, general and special, as to the court may seem fit and proper.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

25 Defendant's Second Amended Original Answer.

Filed May 28, 1900.

In the United States Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } #2118.

Now comes the defendant, — leave of the court, and amends its pleadings heretofore filed herein and files this its second amended original answer in lieu of all other pleadings heretofore by it filed.

1st. Defendant excepts to plaintiff's petition and says same does not contain facts sufficient to constitute a cause of action against it, and of this it prays the judgment of the court.

2nd. (*a.*) Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorneys' fees and statutory damages in this action, because such attorneys' fees and damages are asserted and claimed under a statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said Constitution and provisions of the constitution of the State of Texas, and therefore void.

(*b.*) Defendant specially excepts to that portion of paragraph No. 2 in said petition which avers that A. J. Brown solicited insurance, because it is immaterial what solicitations were made so long as they eventuated in a contract.

(*c.*) Defendant specially excepts to all of paragraph No. 5 in said petition, because the same presents no issuable fact, because the averments therein are immaterial and irrelevant to any issue and because they are calculated to prejudice the defendant on the trial of the case, and because there is no issue in the case as to the sufficiency of the preliminary proofs or of any preliminary proofs.

(*d.*) Defendant also specially excepts to paragraph No. 6, be-
26 cause there is no issue in the case involving the question of estoppel.

(*e.*) Defendant also excepts to paragraph No. 7, because the allegations therein are immaterial and irrelevant to the issue, contain no issuable facts; because there is no issue thereon; because same is calculated to prejudice the defendant on the trial hereof.

(*f.*) The defendant also specially excepts to paragraph No. 8 of said petition for the reasons above indicated, and prays that each one of these special demurrers be sustained by the court, and the said immaterial, irrelevant and prejudicial matter be stricken from the files and for naught held.

3rd. The defendant denies each and singular the allegations in

plaintiff's petition contained, and demands strict proof thereof, and of this it puts itself upon the country.

4th. For further answer herein, defendant avers that the policies or contracts upon which this suit is based are in writing, and consist of the application signed by the assured and the policies issued thereon, both of which contain certain covenants and warranties which are part of said contract of insurance and the consideration therefor; that among the provisions and conditions in said policies sued upon there is the following in each one of said policies, to wit: "That if any concealment or untrue statement or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso fact-* null and void, and all monies paid hereon shall be forfeited to said association;" that among the statements made by the insured in the said application, and warranted by him to be true, was the following: "That my present occupation is real estate and farming." Defendant avers that the said statement was and is false and untrue; that assured was not at the time of his application a dealer in real estate or a real-estate agent; that he was not and for long time prior thereto had not been, if ever he was, engaged in farming, and that his occupation was at the time and just preceding the making of said application that of an assist-
27 ant in a photograph gallery; that his prior occupation before the time of his being so employed as such assistant was not that of a book-keeper; all of which defendant stands ready to verify.

Wherefore it says there was a breach of the warranty in each of said policies contained as to the present and prior occupation of the insured; that each of said policies are absolutely null and void, and plaintiff is not entitled to recover thereon.

5th. And, further answering, defendant avers that by the terms of the said policies and each of them, as conditions precedent to their continuance in force and validity, the assured promised and agreed that the stipulated payments in advance to defendant of $32.50 upon the 28th day of the months of October and April in every year for the period of ten years from October 28th, 0896, should be made by him on each policy, and that if any semi-annual premiums were not paid as by said policies were provided, then the said policy should thereby become null and void. Defendant avers that the said semi-annual premiums accruing since the issuance of said policies and each of them have neither nor have any of them been paid; that one semi-annual payment on each of said policies was due on the 28th day of April, 1897, which was not paid, and that by the failure to pay the same the said policies and each of them became null and void.

Wherefore the plaintiff is not entitled to recover herein.

6th. And for further answer defendant avers in any event, and even though the said Hunter be dead, it is not liable for the penalty and attorney's fees claimed in -aid petition because it is chartered and authorized to do business in the State of Texas under the assess-

ment and natural premium plan, in accordance with and under the requirements of article 3090, Revised Statutes of Texas of 1895, and was doing business under the same law and on the same plan at the time of the issuance of the policies sued on, and has so continued to do business since then, and that plaintiff is not entitled to recover
28 the penalty and attorney's fees sued for and prescribed by the statutes of Texas, as claimed in her said amended petition because it says by the provision of section 1, article 14, of the amend-ents to the Constitution of the United States it is provided "that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and that the said act of the legislature of the State of Texas prescribing a penalty and imposing attorney's fees is contrary to and violative of the Constitution of the United States, section 1, article 14, thereof, as well as other provisions, ans is therefore void, and plaintiff is not entitled to recover thereunder; all of which the defendant stands ready to verify.

PERKINS, GILBERT & PERKINS AND
JOHN W. WRAY, Attorneys for Defendant.

Amended First Supplemental Petition.

Filed May 28, 1900.

In the U. S. Circuir Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASS'N. } #2118.

Now comes the plaintiff in the above-entitled cause, and, leave of the court first had, files this her amended first supplemental petition in reply to defendant's first amended original answer, and by way of amendment and reply thereto, plaintiff says:

1. Plaintiff denies all and singular the allegations contained in said answer.

2. Further answering, plaintiff says that the defendant is a cor-
29 poration, duly incorporated under the laws of the State of Pennsylvania, with its principal office and domicile in the city of Philadelphia, said State of Pennsylvania; that the contracts or policies of insurance sued upon were issued in the city of Philadelphia, State of Pennsylvania, and in obedience to the laws thereof, and that, therefore, the said insurance policies are contracts made under and by virtue of the laws of the said State of Pennsylvania; that under the laws of said State in force at the time of the issuance of said policies it was provided in effect that no statement

made in an application for an insurance policy should be considered a warranty unless the same materially affected the risk assumed by the insurance company in the issuance of the policy.

Plaintiff further says that the alleged representation with reference to the occupation of the said William A. Hunter, as stated in defendant's answer, is not shown to have been material or to in anywise affect the risk assumed by the defendant in the issuance of said policies; that the same appears to be utterly immaterial. Wherefore plaintiff says that under the laws of the State of Pennsylvania the all-ged statement with reference to the occupation of the assured is immaterial and in nowise affects the validity of said policies of insurance; all of which she stands ready to verify.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

Further answering, plaintiff says, in reply to the fourth subdivision of said answer, that, at the time said policies were issued, defendant's agent who took the application for said insurance and issued said policies had full knowledge of the occupation, present and past, of said William A. Hunter; that defendant and its said agent had notice of the extent and nature of the assured's occupation, the extent of his deal in real estate and farming, and of the extent of his prior occupation of book-keeping; that at the time defendant issued said policies and subsequently thereto, up until the institution of this su-t, the defendant was fully advised with reference to the past and present occupation of the deceased; that with such knowledge the defendant accepted the payment of premiums on said policies, and thereby waived any objection it might have urged thereto because of the deceased's said occupation.

Plaintiff further says that the defendant has never sought to have said policies canceled because of any warranties contained therein or of the warranty set up in said answer as being untrue; has never tendered back to the deceased or any representative of his the moneys paid on said policies, nor done any other act or thing, or made any contention that said policies were void or voidable because of any such alleged breach of warranty; that after the death of said assured defendant, bein- in full possession of all the facts, never sought to avoid or cancel said policies because of any such alleged breach of warranty, and never made any such contention until after the institution of this suit, but always treated said policies as a subsisting demand until the alleged death of said insured.

Wherefore plaintiff says that if there was any breach of said warranties, as alleged, which is not admitted but denied, that the same has been fully waived by the defendant, and defendant is now and

should be estopped from asserting any such breach of warranty, all of which plaintiff stands ready to verify.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

Defendant's Supplemental Answer.

Filed May 28, 1900.

In the United States — Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } #2118.

31 Noe comes the defendant, leave of the court, and files this its first supplemental answer in response to plaintiff's first supplemental petition, filed February 2nd, 1900, and, answering the same:

1st. It demurs to all that portion of the said pleading following the general denial, and says the same is insufficient in law and constitutes no matter of defense to the defendant's second amended original answer, and of this it prays the judgment of the court.

PERKINS, GILBERT & PERKINS, AND
JOHN W. WRAY, Attorneys for Defendant.

2nd. Further answering, it denies each and singular the allegations therein, and of this it puts itself upon the country.

PERKINS, GILBERT & PERKINS, AND
JOHN W. WRAY, Attorneys for Defendant.

3rd. Further answering, defendant avers that the contracts or policies of insurance were made in Texas; that they were delivered in Texas to the assured, who was then a resident of Texas, and the semi-annual premium was paid in Texas; that they were payable in Texas in event of the condition happening which would create a liability to pay, and were and are wholly governed, controlled, interpreted and to be construed by the laws of Texas regulating, interpreting and construing contracts of like character; all of which it stands ready to verify.

PERKINS, GILBERT & PERKINS, AND
JOHN W. WRAY, Attorneys for Defendant.

Indorsed as follows: #597 equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Plaintiff's bill of complaint. Filed May 19th, 1903. J. H. Finks, clerk.

32 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, *v.* JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity. No. 597.

Plaintiff's Motion for Allowance of Substituted Service.

To the honorable the judges of the circuit court of the United States for the northern district of Texas:

1.

Now comes The Fidelity Mutual Life Insurance Company, the plaintiff in the above styled suit, and moves the court to allow substituted service therein upon the defendants, Jennie M. Smythe, James N. Smythe and Phillips Investment Company, showing to the court as follows the grounds of its said motion.

2.

The defendant, Jennie M. Smythe, is the wife of the defendant, James N. Smythe, to whom she was married on or about March 26, 1903. For about seven years next preceding her said marriage she was a widow, and was named Jennie M. Mettler. Both said defendants reside in and are citizens of Licking county, Ohio. The defendant, Phillips Investment Company, is a private corporation, incorporated under the laws of the State of Missouri, and has its domicile in Jackson county, Missouri. No one of said three defend-
ants has an agent in the State of Texas for the service of pro-
33 cess, so far as the plaintiff is informed. The plaintiff is a private corporation, incorporated many years ago by the State of Pennsylvania under the name of the Fidelity Mutual Life Association of Philadelphia. By amendment of its charter, it changed its name on to-wit August 22, 1899, to the Fidelity Mutual Life Insurance Company, without in any way affecting its identity.

3.

On to-wit, July 4, 1900, in the cause entitled Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia, and numbered 2118 upon the law docket of this court, the defendant, Jennie M. Smythe (under the name of Jennie M. Mettler) recovered against the plaintiff (under the name of the Fidelity Mutual Life Association of

Philadelphia) a money judgment for the sum of twenty-one thousand five hundred fifty dollars, together with interest thereon at the rate of six per centum per annum from and after said date, and all costs of suit. Thereafter, said judgment was reviewed by the Supreme Court of the United States upon a writ of error, and was by it in all things affirmed on to-wit May 5, 1902. In the meantime, an interest in said judgment, which on June 3, 1902, amounted to one thousand five hundred forty and 25/100 dollars had passed by mesne assignments from the defendant, Jennie M. Smythe, to the defendant, Phillips Investment Company. On to-wit June 3, 1902, the plaintiff paid into the registry of this court the sum of twenty-four thousand twenty-eight and 25/100 dollars, being the amount of said judgment with the interest thereon accrued, wherewith to discharge the same; and afterwards it paid all the cost of suit which had not theretofore been paid by it. On said date the clerk of this court, under its direction, distributed said sum of twenty-four thousand twenty-eight and 25/100 dollars among the defendant, Jennie M. Smythe, and her assignees; and so he paid to the defendant Jennie M. Smythe, the sum of eleven thousand six hundred sixteen dollars, and to the defendant, Phillips Investment Company, the sum of one thousand five hundred forty and 25/100 dollars of the plaintiff's money.

34

4.

The cause in which the defendant, Jennie M. Smythe, procured said judgment against the plaintiff was an action at law brought by her to recover upon three policies of the principal sum of five thousand dollars each upon the life of one William A. Hunter, in her favor. In said cause she alleged that said William A. Hunter died on or about December 4, 1896, and convinced the jury that such allegation was true. Said William A. Hunter did not die December 4, 1896. He still lives, and is now confined in jail in Jefferson county, Alabama, pending his surrender to the State of Texas for trial upon a charge of swindling the plaintiff in and about the obtaining of said sum of money from it.

5.

This bill is brought to enjoin all the defendants from in any way making use of said judgment; and especially from ever setting up said judgment by answer, plea, or demurrer as an adjudication that the said William A. Hunter died on or about December 4, 1896, or as an adjudication of said three policies, or as serving in any way to justify them or any of them in receiving and converting to their own use the plaintiff's money as aforesaid. The plaintiff further prays that each of the said defendants who received any of its money as aforesaid be decreed to repay it with legal interest thereon, and prays for general relief. The ground set up by the plaintiff for the relief sought is that said judgment was obtained by means of fraud.

6.

In consideration of the premises, the plaintiff moves the court to direct that each of said defendants, Jennie M. Smythe, James N. Smythe and Phillips Investment Company, be served by delivering to him a copy of the subpœna together with a certified copy of the plaintiff's bill of complaint and a certified copy of the order of the court made upon this motion, such delivery to be made and returned in the usual form by the United States marshal for the southern district of Ohio, or any of his deputies, as to the defendants, Jennie M. Smythe, and James N. Smythe, and by the United States marshal for the western district of Missouri, or any of his deputies, as to the defendant, Phillips Investment Company. And the plaintiff further moves the court to order that such service shall be deemed good service for all the purposes of this suit.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

THE STATE OF TEXAS, }
County of Dallas. }

Andrew J. Brown, being first duly sworn, makes oath and says: I am general agent for Texas of The Fidelity Mutual Life Insurance Company, the plaintiff in the above styled suit. The allegations contained in the foregoing motion are true.

ANDREW J. BROWN.

Sworn to and subscribed by Andrew J. Brown before me, this the 19th day of May, A. D. 1903.

[SEAL.]

B. E. JULIAN,
Notary Public, Dallas County, Texas.

Indorsed as follows: #597 Equity. The Fidelity Mutual Life Insurance Company, *v.* Jennie M. Smythe, *et al.* Plaintiff's motion for allowance of substituted service. Filed May 19, 1903. J. H. Finks, clerk. Maurice E. Locke, attorney and counselor, Dallas Texas.

36 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

Order Allowing Substituted Service.

On this, the 20th day of May, in chambers at Fort Worth in the northern district of Texas, coming on to be heard the motion of the plaintiff in the above styled suit for the allowance of substituted service upon certain of the defendants therein, and said motion being duly considered, it is ordered by the court:—

That each of the three defendants, Jennie M. Smythe, James N. Smythe and Phillips Investment Company, be served by delivering to him a copy of the subpœna together with a certified copy of the plaintiff's bill of complaint and a certified copy of this order, such delivery to be made and returned in the usual form by the United States marshal for the southern district of Ohio, or any of his deputies, as to the defendants, Jennie M. Smythe and James N. Smythe; and by the United States marshal for the western district of Missouri, or any of his deputies, as to the defendant, Phillips Investment Company, and that such service shall be deemed good service for all the purposes of this suit.

EDWARD R. MEEK,
United States District Judge, Northern District of Texas.

Indorsed as follows: # 597 Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Order allowing substituted service. Filed May 20th, 1903. J. H. Finks, clerk.

37 In the United States Circuit Court at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company
vs.
JENNIE M. SMYTHE ET AL. } # 597. In Equity.

The demurrers of the Phillips Investment Company, Morris A. Spoonts, William H. Clark, and Charles A. Culberson to the bill of complaint of The Fidelity Mutual Life Insurance Company, complainant.

These defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of com-

plaint contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill, and for cause of demurrer show: That the complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against these defendants, touching the matters contained in the said bill, or any of such matters.

And for further cause of demurrer these defendants show that the complainant is not entitled to sustain said bill as to them or either of them, for the following reasons, to wit:

1. Because the averments of the bill do not make or state such a case as entitles complainant to the equity jurisdiction of the United States circuit courts under the Constitution of the United States.

2. Because neither of these defendants are therein charged with any fraud, conspiracy, want of good faith, or other illegal act.

3. Because it appears that the fraud charged against their co-defendants was the material issue in said trial of said former suit.

4. Because it does not appear that they, or either of them
38 are necessary or proper parties to said bill of complaint.

Wherefore, these defendants demur to the said bill and to all matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer thereto, and pray to be dismissed with their reasonable costs in this behalf sustained.

ALEXANDER & THOMPSON,
ETHERIDGE & BAKER,
Solicitors for Defendants.

I certify that in my belief the foregoing demurrers of The Phillips Investment Company, Morris A. Spoonts, Charles A. Culberson, and William H. Clark, defendants to the bill of complaint of the Fidelity Mutual Life Insurance Company, are well grounded in law and proper to be filed in the above cause.

F. M. ETHERIDGE,
Solicitor for Defendants.

UNITED STATES OF AMERICA,
Northern District of Texas.

M. A. Spoonts, defendant, on oath says that he has read the foregoing demurrers to the bill of complaint of the Fidelity Mutual Life Insurance Company in this suit and that the same are not interposed for the purpose of delaying the said suit or other proceedings therein; all of which he says for himself and his abovenamed co-defendants.

M. A. SPOONTS.

Subscribed and sworn to before me, this 26th day of June, A. D. 1903.

[SEAL.]

H. C. JARREL,
Notary Public, Dallas County, Texas.

39 Indorsed as follows: In the United States circuit court at Dallas, Texas. The Fidelity Mutual Life Insurance Company, No. 597, *vs.* Jennie M. Smythe, *et al.* Demurrers of defendants, Phillips Investment Co., *et al.* Filed 6 day of July, 1903, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy. Etheridge & Baker, Alexander & Thompson, solicitors for defendants.

40 In the United States Circuit Court for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company *vs.* JENNIE M. SMYTHE ET AL. } No. 597. In Equity.

The Plea of Jennie M. Smythe and James N. Smythe, Defendants, to the Bill of Complaint of The Fidelity Mutual Life Insurance Company, Plaintiff.

These defendants, Jennie M. Smythe and James N. Smythe, specially appearing under protest, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, but appearing for the purpose of this plea and for no other, say that they, nor neither of them, are citizens or inhabitants of said State of Texas, nor do they, or either of them, reside therein, but that they and each of them, are citizens and inhabitants of said State of Ohio, residing at Newark, in the county of Licking, in the southern Federal district of Ohio.

That as appears from said bill of complaint, the plaintiff sues herein to vacate, on grounds of alleged fraud in the obtaining thereof, a personal judgment heretofore obtained and collected by said defendant, Jennie M. Smythe, then Jennie M. Mettler, a widow, in this honorable court, against it, the plaintiff.

That the defendant, James N. Smythe, is now the husband of said Jennie M. Smythe, and as such is joined herein merely *pro forma*.

That as apparent from said bill of complaint the plaintiff has no joint cause of action against these defendants and their co-defendants mentioned therein as residing within the jurisdiction of

41 this honorable court.

That these defendants respectively insisting upon the exemption from suit in this honorable court, respectively say that not this honorable court, but the circuit court of the United States for the southern district of Ohio, at Columbus, Ohio, wherein they and each of them reside, has jurisdiction in the premises; wherefore, these defendants present this their plea of personal privilege to be

sued within said district wherein they reside as aforesaid; and pray the judgment of this honorable court whether they or either of them ought to be required to make any other or further answer to said bill; and pray to be hence dismissed with their costs in this behalf sustained.

W. H. CLARK,
Counsel for Defendants, James N. Smythe and Jennie M. Smythe.

STATE OF OHIO, }
County of Licking. }

Jennie M. Smythe makes oath and says that she is one of the defendants in the above mentioned suit and that the foregoing plea to the jurisdiction therein is true in point of fact; which she does for herself and her co-defendant, James N. Smythe.

JENNIE M. SMYTHE.

Sworn to and subscribed before me, this 5th day of August, A. D. 1903.

[SEAL.] PHIL B. SMYTHE,
Notary Public in and for Licking County, Ohio.

STATE OF TEXAS, }
County of Dallas. }

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

W. H. CLARK,
Counsel for Defendants, James N. and Jennie M. Smythe.

42 Indorsed as follows: No. 597. In the United States circuit court for the northern district of Texas, at Dallas. The Fidelity Mutual Life Insurance Co. No. 597, *vs.* Jennie M. Smythe *et al.* Plea to the jurisdiction. Filed Aug. 8, 1903. J. H. Finks, clerk.

43 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

FRIDAY, November 27, 1903.

Heretofore, on to-wit Friday November 6, 1903, and Saturday, November 7, 1903, the plea of privilege filed in the above numbered and entitled suit on August 8, 1903, by the defendants Jennie

M. Smythe and James N. Smythe, came on to be heard and argued in chambers at Ft. Worth, Texas, before the Honorable Edward R. Meek, United States district judge for the northern district of Texas. Also, at the same time and place, and in the same presence, came on to be heard and argued the demurrers filed in said suit on July 6, 1903, by the defendants William H. Clark, Charles A. Culberson, Morris A. Spoonts and Phillips Investment Company. Thereupon, after having been fully argued, said plea of privilege and said demurrers were taken under advisement.

Now, on Friday, November 27, 1903, in chambers, at Fort Worth, Texas, the Honorable Edward R. Meek, district judge, as aforesaid, having considered said plea of privilege and said demurrers, doth order concerning them as follows:

The said plea of privilege of the defendants Jennie M. Smythe and James N. Smythe is in all things overruled; and the said defendants are ordered to answer in said suit on or before the

44 first Monday of January, 1904.

All the said demurrers of the defendants William H. Clark, Charles A. Culberson, Morris A. Spoonts and Phillips investment Company are overruled; except those by them styled their second and fourth additional causes of demurrer, which are sustained.

And the plaintiff's counsel having indicated upon the argument of said demurrer matter which has been omitted from the plaintiff's bill of complaint because it had been advised that the same was matter of defense rather than of original complaint, and having now asked leave to amend said bill in order to meet the views of the court; the plaintiff is now granted leave to amend its bill of complaint filed in said suit on May 19, 1903, and is ordered to file its amendment on or before the first Monday in January, 1904.

EDWARD R. MEEK,
United States District Judge, Northern District of Texas.

Indorsed as follows: #597, equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Order on demurrers and plea of privilege of defendants. Filed Nov 30th, 1903; J. H. Finks, clerk.

45 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, WILLIAM H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. 597.

The Plaintiff's First Amendment of its Original Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the northern district of Texas:

Now by its solicitor comes the plaintiff in the above styled suit, and under leave of the court granted November 27th 1903, amends its original bill of complaint therein filed May 19, 1903, by inserting after section 7 and before section 8 of said bill a new section to be numbered 7½ and to read as follows.

7½. Sometimes the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company allege and pretend that each of them acquired his several interest in the judgment and the fund described in section 5 of this bill, for a valuable consideration by him then paid in good faith, and without notice of the fact that William A. Hunter did not die on or about December 4, 1896, as averred by the plaintiff in the aforesaid action of Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia. And they pretend that therefore they should not be called upon to return to the plaintiff its moneys severally received by them as set forth in section 6 of this bill.

But your orator charges the truth to be as follows.

On to-wit October 27, 1897, before the institution of her said action, Jennie M. Mettler by a written contract of that date, employed
46 William M. Alexander, William H. Clark and William L. Hall, attorneys at law doing business as co-partners under the firm name of Alexander, Clark & Hall, to institute and prosecute suit against the Fidelity Mutual Life Association of Philadelphia upon its three policies of insurance described in section 3 of this bill. By said written contract also, in consideration of the legal services rendered and to be rendered by them, she transferred and conveyed to said Alexander Clark & Hall an undivided one-third interest in said three policies. Thereupon they instituted and prosecuted the said action for the common benefit of Jennie M. Mettler and themselves. Thereafter, on to-wit May 29, 1902, by a written transfer endorsed thereon, William M. Alexander and William L. Hall assigned and transferred to William H. Clark all their right and interest in said contract. The plaintiff has reason to believe, and does

believe, and so alleges that when said contract was made on October 27, 1897, William H. Clark knew that the Fidelity Mutual Life Association of Philadelphia denied that William A. Hunter was dead: and that he then knew that the principal work which he and his co-partners were undertaking by said contract was the effort to obtain an adjudication that said William A. Hunter was in fact dead; and that *and that* so he took the transfer contained in said contract with actual notice of this plaintiff's rights and defenses. Thereafter on to-wit June 10, 1899 the firm of Alexander, Clark & Hall having been dissolved and the firm of Alexander, Clark & Thompson having been formed by William H. Alexander, William H. Clark and William Thompson, the contract described in the first paragraph of section 6 of this bill was made by Jennie M. Mettler with Alexander, Clark & Thompson and William L. Hall as a substitute for the aforesaid contract of October 27, 1897. When such new contract was made, said action had been pending for more than a year; and by its pleadings therein filed this plaintiff had denied that William A. Hunter had died as alleged, and so had given notice of its rights and defense to all persons dealing with said action
47 or the matters therein litigated. When said new contract was made, all the parties thereto had actual knowledge of the denial so made by this plaintiff. The sum of eight thousand three hundred forty six dollars received by William H. Clark as set forth in section 6 of this bill was received by him solely by reason of and in pursuance of said two contracts, and especially of said contract of June 10, 1899. Said sum was paid to William H. Clark by the clerk of the court by means of his check No. 247 for eight thousand three hundred forty-six dollars drawn June 3, 1902, on the American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia.

The sum of fifteen hundred dollars received by Morris A. Spoonts as set forth in section 6 of this bill was paid to said Spoonts by the clerk of the court by means of his check No. 425 for fifteen hundred dollars, drawn June 3, 1902, on the American National Bank of Dallas with instructions to pay the same out of the funds deposited in said cause of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia. Said Spoonts endorsed said check in blank and transferred the same to the Fort Worth National Bank of Fort Worth, Texas; to which bank it was paid June 6, 1902, by the American National Bank of Dallas by crediting its amount to the account current of said the Fort Worth national bank. Such payment was made to said Spoonts by order of William H. Clark, and out of Clerk's share of said judgment. Said order was given by said Clark, and was accepted and acted upon by said Spoonts and the clerk of the court, as an assignment of an interest of fifteen hundred dollars in the judgment and the fund deposited in court by this plaintiff wherewith to discharge the judgment. When said order was given and accepted, said Spoonts had been for a long time act-

ing as attorney for Jennie M. Mettler in her said suit against this plaintiff: and he had actual knowledge of its denial by its pleadings filed in said cause of the alleged death of William A.
48 Hunter, and so had actual notice of this plaintiff's rights and defenses. He did not part with any new and valuable consideration in exchange for said assignment or said check, but accepted the same in satisfaction of an antecedent debt, to-wit of his fees for professional services theretofore rendered in said cause.

The sum of one thousand twenty-six dollars received by Charles A. Culberson as set forth in section 6 of this bill was paid to said Culberson by the clerk of the court by means of his check No. 426 for one thousand twenty-six dollars, drawn June 3, 1902, on the American National Bank of Dallas, with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia. Said Culberson transferred said check by endorsement to the National Exchange Bank of Dallas; to which bank the same was paid June 12, 1902, through the Dallas clearing house by the American National Bank of Dallas. Such payment was made to said Culberson by order of William H. Clark, and, as this plaintiff upon good grounds verily believes and alleges, out of Clark's share of said judgment. Such order amounted to, and was accepted as, an assignment of an interest of one thousand twenty-six dollars in the fund deposited in court by this plaintiff wherewith to discharge said judgment. When said order was given and accepted, said Culberson had been acting for more than a year as counsel for Jennie M. Mettler in the United States Supreme Court in her said action against this plaintiff. As such counsel he had made a careful examination of the record in said cause, and knew its contents. He knew that by its pleadings therein filed this plaintiff had denied that William A. Hunter had died as alleged; and he knew that one of the errors assigned by this plaintiff in the Supreme Court was the refusal of the trial judge to charge the jury preemptorily in its favor, upon the ground that there was no evidence that said Hunter was dead, and that the evidence established the fact that he was not dead. And so when he accepted said *accepted said* assignment said Culberson had act-
49 ual notice of this plaintiff's rights and defenses. He did not part with any new and valuable consideration in exchange for said assignment or said check, but accepted the same in discharge of an antecedent debt, to-wit of his fee of one thousand dollars for professional services rendered in said cause and of an expense bill of twenty-six dollars for printing a brief therein.

The sum of fifteen hundred forty and 25/100 dollars received by Phillips Investment Company as set forth in section 6 of this bill was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25/100 dollars, drawn June 3 1902, on the American National Bank of Dallas, with instructions to pay the same out of the funds deposited in said cause of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia,

Phillips Investment Company endorsed said check and transferred it to the Bank of Montreal which endorsed the same and transferred it to the Fourth Street National Bank of Philadelphia, which in turn endorsed the same and transferred it to the City National Bank of Dallas; and to said bank it was paid June 16, 1902, through the Dallas clearing house, by the American National Bank of Dallas. Said payment was made to Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6 of this bill. By said assignment, under date of October 29 1901, William H. Clark assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows: "All of my right, title and interest that is my contingent attorneys' fees of about $8000.00, in the cause of action and judgment of $21,550.00, rendered thereon on the 4th day of July, A. D. 1900, in the United States circuit court for the northern district of Texas, at Dallas. In the life insurance case of Jennie M. Mettler *vs.* Fidelity Mutual Life Association of Philadelphia, numbered 2118: Said judgment rendered as aforesaid in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States." Said assignment was given as
50 collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy one and 57/100 dollars, together with interest thereon at the rate of eight per centum per annum from date such interest to be paid semi-annually and each installment thereof to bear interest at the rate of ten per centum per annum from its maturity. Said note was given for a preëxisting indebtedness. Said assignment was filed with the clerk of the court December 2, 1901. When said assignment was given and accepted, and when it was filed in the circuit court said cause was pending in the Supreme Court to which this plaintiff had removed it by a writ of error filed September 1, 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900. In accepting said assignment of such cause of action and such suspended judgment Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe and does believe, and so alleges, that in accepting said assignment Phillips Investment Company was acting under the advice of its attorneys, the aforesaid William M. Alexander and William Thompson, then doing business as co-partners under the firm name of Alexander and Thompson. Said Alexander & Thompson when the advised Phillips Investment Company to take such assignment had actual knowledge as aforesaid that this plaintiff by its pleadings filed in said cause, denied that William A. Hunter, had died as alleged This plaintiff further has

reason to believe and does believe and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of the alleged death of William A. Hunter and that this plaintiff denied that he had died as alleged. Sometimes, however Phillips Investment Company pretends that it can disregard said assignment and rest its rights upon the check given it by the clerk of the court as aforesaid, and
51 upon its surrender of said note in exchange therefor. As to this the plaintiff avers the truth to be, that said check was given solely because of and in pursuance of said assignment. And further it avers that in accepting such check and surrendering such note, Phillips Investment Company was represented by, and acted only through its said attorneys Alexander & Thompson: and that they then and there had full knowledge of the main issue involved in said litigation and knew that this plaintiff had always denied that William A. Hunter had died as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for said check but accepted the same in discharge of antecedent indebtedness.

Wherefore the plaintiff prays that this its amendment be annexed to and read with, its original bill of complaint, as section 7½ thereof.

MAURICE E. LOCKE,
Solicitor and Counsel for Plaintiff.

THE STATE OF TEXAS, }
County of Dallas. }

Andrew J. Brown, being first duly sworn makes oath and says: I am general agent for Texas, of The Fidelity Mutual Life Insurance Company, the plaintiff in the above styled suit. The allegations contained in the plaintiff's foregoing amendment of its original bill of complaint are true, except such as are made upon information and belief and them I believe to be true.

ANDREW J. BROWN.

Sworn to and subscribed by Andrew J. Brown before me this 11th day of December A. D. 1903.

H. J. MARTYN,
[SEAL.] Notary Public, Dallas County, Texas.

Endorsed as follows: No. 597 Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's first amendment of its original bill of complaint. Filed 11 day of Dec. 1903. J. H. Finks, clerk by C. B. Hollarn, deputy.

52 In the United States Circuit Court for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company
vs.
JENNIE M. SMYTHE ET AL.
} No. 597. In Equity.

The Demurrers of Jennie M. Smythe and James N. Smythe, Defendants, to the Bill of Complaint of The Fidelity Mutual Life Insurance Company, Complainant.

These defendants, now and at all times saving and reserving and in nowise waiving their exceptions to the action of the court overruling their plea of personal privilege to be sued in the Federal district wherein they reside, come, and, by protestation, not confessing nor acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are herein and thereby set forth and alleged, state the foregoing causes of demurrer to the said bill, towit:

1. The complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to any relief or discovery against these defendants touching the matters contained in the said bill, or any of such matters; wherefore, these defendants pray judgment.

2. The complainant is not entitled to sustain said bill for the reason that it has a full, complete and adequate remedy at law; wherefore these defendants pray judgment.

3. The bill is wholly insufficient because it does not set out or state all of the material proceedings in the original suit, wholly failing in many particulars, and in others giving mere conclusions or a mere synopsis of what the pleader regard- as the substance
53 sought to be reviewed; wherefore, defendants pray judgment.

4. The bill is especially insufficient because it does not set out or state all of the material evidence introduced on the trial by the defendant and the plaintiff, which it must do to be entitled to a bill of review; wherefore, defendants pray judgment.

5. The bill showing that complainant appealed from the judgment complained of herein to the Supreme Court of the United States, and that the judgment was there affirmed; and being based upon newly discovered evidence; the bill is insufficient for that it does not show the complainant obtained leave from the Supreme Court of the United States to file and prosecute this suit; wherefore these defendants pray judgment.

6. There are no averments in the bill which show any error in the record; the slur in paragraph 5 of the bill upon the legislature of Texas in allowing by statute reasonable attorney's fees and 12 per

cent. damages, being rendered impertinent by the decision of the Supreme Court of the United States affirming the judgment, as, also, the complaint, that this honorable court and the Supreme Court of the United States allowed the verdict to stand, when the only evidence supporting it was, according to the allegations of the bill in paragraph 5, as follows, to-wit:

"The only evidence produced at said trial tending to establish as "a fact the death of William A. Hunter was the evidence of the cir- "cumstances connected with his disappearance, the evidence of the "family reputation that he was dead, and the fact that during the "period of more than three years elapsing between his disappear- "ance and said trial the defendant company had been unable to "procure any direct and positive proof which the jury deemed "worthy of credit that he had not died as alleged."

7. That the time limited by law and by the rules of practice of courts for the exhibiting and filing such bill of review had elapsed long prior to the exhibiting and filing of said bill of com-
54 plaint and complainant is precluded from having the said decree reviewed or vacated.

8. The bill of complainant clearly shows that before suit it refused to pay the policies on the ground that said Hunter was not dead; and that on the trial of the original suit, in the language of the bill, "the principal subject of the controversy at said trial," was whether Hunter was dead, which is now, "the only issue pertinent to this bill;" that complainant was not deceived or made to believe that Hunter was dead by the alleged fraudulent schemes to induce it to so believe; and not being misled by said deceit and scheme on the only issue presented by the bill, complainant is not entitled to the relief sought; wherefore defendants pray judgment.

9. That in so far as complainant sues to have said judgment adjudged to have been obtained by fraud and deceit, the complainant is estopped from exhibiting against these defendants said bill of complaint, because it clearly appears from the said bill that all of the fraud by which said judgment is alleged to have been obtained was by the complainant properly tried in said former suit, it being then, as it is now, convinced of the fact now asserted by it for the second time, that Hunter was not dead but is alive; and, in said former suit witnesses were examined and evidence was taken upon said question, whether Hunter was dead or alive and had disappeared that his sister might pretend he was dead and collect said insurance; and this issue was carefully and thoroughly tried upon the proposition that the testimony was not sufficient to support the finding that Hunter was dead; and said judgment so rendered upon said issue of fact, so far as it depends upon the proofs is conclusive on a bill of review, and the only questions for examination by a bill of review are such as arose upon the pleadings, proceedings and judgment without reference to the evidence, the which are not presented by complainant's bill; and a fraud which will sustain a bill

of review must be one extrinsic or collateral to the matters
55 tried, and not one which was in issue in the former suit, as was the question involved herein of whether Hunter died on December 4th, 1896, or whether he did not die but disappeared for his sister to collect said insurance; wherefore, defendants pray judgment.

10. There having been a trial by jury in said original action at law, in this honorable court, wherein the judgment now sought to be set aside was rendered, it follows under and by virtue of the seventh amendment to the Constitution of the United States that said facts so tried and decided can not be re-examined in any court of the United States otherwise than upon *a new trial*, either granted by the court in which the first trial was had, or to which the record was returnable or ordered by an appellate court for error in law; and not being authorized to re-examine said facts upon complainant's bill of review, it is not within the power of the court to now vacate said judgment, and the said bill should be dismissed.

Wherefore, these defendants demur to the said bill and to all matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further answer thereto, and pray to be dismissed with their reasonable costs in this behalf sustained.

STANLEY, SPOONTS & THOMPSON,
WILLIAM H. CLARK,
Solicitors for Defendants, Jennie M. Smythe
and James N. Smythe.

We certify, that in our belief the foregoing demurrer of Jennie M. Smythe and James N. Smythe, defendants, to the bill of complaint of the Fidelity Mutual Life Insurance Company is well founded in law, and proper to be filed in the above cause.

M. A. SPOONTS,
WM. H. CLARK,
Solicitors for said Defendants.

56 UNITED STATES OF AMERICA,
Northern District of Texas.

Before me, the undersigned authority, on this day personally appeared Wm. H. Clark, who being by me duly sworn, on oath deposes and says that he is solicitor for the defendants, Jas. N. Smythe and Jennie M. Smythe, and that he has read the foregoing demurrer to the bill of complaint of the Fidelity Mutual Life Insurance Company in this suit, and that the same is not interposed for the purpose of delaying the said suit or other proceedings therein.

WM. H. CLARK.

Sworn to and subscribed before me, this the 11th day of January, A. D. 1904.

[SEAL.]

H. C. JARREL,
Notary Public, Dallas County, Texas.

Indorsed as follows: 597. Eq. In the United States circuit court for the northern district of Texas, at Dallas. No. 597. The Fidelity Mutual Life Insurance Company, *vs.* Jennie M. Smythe, *et al.* Demurrer of defendants, Jennie M. Smythe and James N. Smythe. Filed Jan'y 11, 1904; J. H. Finks, clerk. Stanley, Spoonts & Thompson, Wm. H. Clark, solicitors for said defendants.

57 In the Circuit Court of the United States for the Northern District of Texas.

FIDELITY MUTUAL LIFE INSURANCE COMPANY
v.
JENNIE M. SMYTHE ET AL. } No. 597. Equity.

Ordered: That the Phillips Investment Company be, and it is hereby granted leave to file amended demurrer to complainant's amendments to the bill of complaint.

EDWARD R. MEEK,
U. S. District Judge.

In the United States Circuit Court for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY
vs.
JENNIE M. SMYTHE ET ALS. } No. 597. Equity.

The Phillips Investment Company, one of the defendants named in the original bill of complaint, by *presentation*, not confessing or acknowledging all or any of the matters or things in said bill of complaint, and the first amendment thereto filed in this cause, to be true in manner and form as the same are therein and thereby set forth and alleged, expressly refers to and renews against said bill and amendment, as well its various demurrers heretofore filed
58 and urged jointly with defendants M. A. Spoonts, W. H. Clark and C. A. Culberson, and with leave of the honorable court first obtained, presents as additional to the said demurrers already filed, the following:

5. The said bill of complaint and the amendment thereto is multifarious, in that equitable relief and remedies are invoked against defendants Smythe on account of alleged fraud on their part alone, whereas, there is no privity whatever shown between this defendant and said Smythes, or either of them, or any grounds for equitable relief against this defendant.

6. Defendant says that the amendment to the original bill in no material matter alters the defects of the original bill of complaint,

complained of in demurrers two and four heretofore filed, heard, considered and sustained by the honorable court.

7. This defendant says that its surrender to the clerk of the court of the valuable note, principal and interest aggregating the sum of $1540.25, held by it against the defendant W. H. Clark, after the final judgment of the Supreme Court of the United States, in said original cause of Fidelity Mutual Life Insurance Company *vs.* Mettler, and after the payment of said judgment, is a full and ample protection to this defendant as against any equitable proceeding on the part of complainant, and that the doctrine of *lis pendens* invoked by complainant has no application whatever to the facts averred against this defendant.

8. Defendant says there is an absolute lack of equity in the bill of complaint and amendment thereto, in that no offer to place this defendant *statu quo* is made, nor is there any showing made that this defendant can be restored to the position it occupied at the time it parted with and surrendered its valuable securities to the clerk of this court, in pursuance with the orders of this court.

Wherefore this defendant renews its said demurrers to the said bill of complaint and all matters and things therein con-
59 tained, and prays this honorable court whether it shall be compelled to make further or other answer thereto, and prays that it be discharged with its reasonable costs in this behalf sustained.

ALEXANDER & THOMPSON,
Solicitors for Defendant Phillips Investment Co.

I certify that in my belief the foregoing demurrers of The Phillips Investment Company, defendant, to the bill of complaint and amendment thereto of the Fidelity Mutual Life Insurance Company, are well grounded in law and proper to be filed in the above cause.

W. M. ALEXANDER.

THE UNITED STATES OF AMERICA,
Northern District of Texas.

F. S. Young, of Kansas City, Jackson county, Missouri, being duly sworn on oath says, that he has read the foregoing demurrers to the bill of complaint and amendment thereto of the Fidelity Mutual Life Insurance Company, in this suit; that he is the agent and representative of the defendant, Phillips Investment Company, in charge of this suit; and that the said demurrers are not interposed for the purpose of delaying the cause of any proceedings herein.

[SEAL.] F. S. YOUNG.

Sworn to and subscribed before me, this the 28th day of December, 1903.

FANNIE O. RUPERT,
Notary Public, Jackson County, Missouri.

Term expires Aug. 12th, 1907.

60 Indorsed as follows: No. 597. Equity. The Fidelity Mutual Life Insurance Company, vs. Jennie M. Smythe *et al.* Demurrers of defendant, Phillips Investment Company. Filed Jan'y 4, 1904. J. H. Finks, clerk. Alexander & Thompson, attorneys at law, Dallas, Texas.

61 In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

THE FIDELITY LIFE INSURANCE COMPANY, Plaintiff, v. JENNIE M. SMYTHE ET AL., Defendants. } In Equity. No. 597.

Upon leave of the court, the defendants, Wm. H. Clark, Morris A. Spoonts, Chas. A. Culberson and Phillips Investment Company, amend their demurrers heretofore filed and demurring to the plaintiff's original bill of complaint, and amendments thereto, and say:

After and following paragraph 4 in their original demurrers insert the following paragraphs and demurrers:

5. Because it appears that in said action trial, judgment and satisfaction at law complained of as wrongful, the main fact necessary to prove was the death of Wm. A. Hunter, which being denied by complainant, then defendant was upon issue joined, submitted to an agreed jury, upon competent and sufficient evidence and said jury, by verdict found in effect that Wm. A. Hunter was, in fact, dead and complainant bound to pay the sums by it promised upon proof of such death. That said verdict and finding of fact was duly affirmed and judgment thereon rendered against complainant by said court having full jurisdiction, and that complainant herein paid and satisfied said judgment whereby the prior contract obligations, as well as said policies and judgment liability of this complainant, were by operation of law conclusively fixed, established,
62 performed, released and extinguished and said facts became and are no longer the subject of legal or judicial inquiry, controversy or determination to the contrary.

6. Because it appears that complainant's right to redress and remedy for the wrongs complained of, if any it has, is only by direct, independent, original personal actions at law or suits in equity against the person or persons guilty of such actionable wrongs, or those taking the benefit or fruits of said fraud or wrong, with notice thereof or without parting with value therefor, and not against these defendants who appear to have acquired by purchase and contracts of assignment the apparently legal and established rights of Jennie M. Metler, for valu-ble and full consideration to her promised, paid and performed prior to the payment by complainant of the amounts it did pay, and without notice of any wrong or fraud towards complainant, and who were guilty of no

act or wrong of which complainant can legally complain, and took the money deposited for that purpose by plaintiff by its direction and consent in payment of its own apparently just and legal obligations, contracts and liabilities to Jennie M. Metler and to these defendants, so acquired by assignment, and not in discharge of any antecedent or other debt to them owing by Jennie M. Metler.

7. Because it appears that these defendants, Clark, Spoonts and Culberson acted at all times, if at all, for Jennie M. Metler only in the capacity of attorneys at law in presenting and prosecuting before the court and jury her legal contract demands against complainant, and the apparently legal and competent evidence thereof, and of complainant's liability and of Hunter's death, and without knowledge or notice of any fact or circumstance not equally open and known to plaintiff at the time and upon facts and circumstances reasonably sufficient to cause the belief that said Hunter was, in fact, dead, and the claim and demand of Jennie M. Metler, in all things just, legal and true and without notice of any fraud or of the fact that said Hunter was not at the time dead, and no
63 fact is alleged by complainant against these defendants for which they can be held guilty of any actionable wrong towards complainant or from which guilty knowledge or notice of the fraud alleged can be imputed, inferred or presumed, nor that they are not assignees and purchasers for value as assignees of the apparently legal and established rights of Jennie M. Metler to receive payment thereof from complainant.

8. Because plaintiff does not do or offer equity, in this: That it appears that Wm. A. Hunter paid value to complainant for its contract obligations to pay to his sister, Jennie M. Metler, the sum of, to-wit, fifteen thousand dollars, upon satisfactory proof of the death of Wm. A. Hunter; and that said Jennie M. Metler did offer and make such proof to the satisfaction of said jury and court, and said right of Jennie M. Metler was not, by contract, dependent upon the fact of the actual death of Hunter or direct proof thereof; and that payment was prematurely demanded and made only after the required proof was made and full opportunity given complainant to contradict and disprove said evidence; and that sooner or later said Hunter's death is sure to occur and said sum be payable, and that by said judgment and its satisfaction complainant's contracts to pay were wholly performed, released and canceled; and that these defendants, by contract of purchase and assignment upon a valuable consideration paid, acquired an interest of one half of such payment, which contracts have also been wholly performed and extinguished and all obligations of all the parties have been performed and extinguished and cannot be recreated or restored by this court nor the parties thereto placed in their former positions; and that these defendants have, in reliance upon the appearance of legal right, changed their positions toward each other and toward said contracts and great injury and injustice would necessarily result to these defendants if compelled to restore the amounts severally re-

ceived. Nevertheless, complainant does not offer to reissue or
64 restore said policies nor refund the sums paid therefor, nor to concede or allow these defendants anything as compensation for the loss and extinguishment of their legal contract rights nor as remuneration or compensation for the professional services as attorneys, nor for their skill, time and labor expended; nor to restore them to their former positions, but seeks only to shift from itself upon these defendants the burden, in whole or in part, of the loss caused complainant by the wrongful act and fraud of Jennie M. Metler and Wm. A. Hunter.

9. Because said amendment to said bill does not state any material fact or any new ground of recovery against these defendants and is, in fact, the same as the bill was prior to the filing of said amendments.

10. The bill of complaint and the amendment thereto show that before suit complainant refused to pay the policies, on the ground that said Hunter was not dead, and on the trial of the original suit, the subject of controversy was whether or not said Hunter was dead, and they further show that the complainant was not deceived or made to believe that Hunter was dead by the alleged fraudulent schemes to induce it to so believe, and not being misled on the only issue presented by the bill, the complainant is not entitled to the relief sought.

11. Said bill is insufficient because it clearly appears therefrom that all of the fraud by which said judgment is alleged to have been obtained was properly tried in said former suit, and in said former suit the witnesses were examined and evidence was taken upon said question of whether Hunter was dead or alive and whether he had disappeared, that his sister might pretend that he was dead and collect said insurance, and this issue was carefully and thoroughly tried in this honorable court and in the Supreme Court of the United States, upon the proposition that the testimony was
not sufficient to support the finding that Hunter was dead,
65 and said judgment was rendered upon said issue of fact, and so far as it depends upon proof, is conclusive in this case; and the fraud alleged is not such fraud as will sustain the complainant's bill, as the same is not extrinsic or collateral to the matters tried in the former suit, but was the question involved therein, and hence said bill of complaint does not state a cause of action cognizable by this court under the well-established rules of equity jurisprudence.

ALEXANDER & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
ETHERIDGE & BAKER,
Solicitors for Defendant.

Indorsed as follows; No 597, In equity. The Fidelity Life Insurance Company, plaintiff, *v.* Jennie M. Smythe, *et al.*, defendants. Defendants' amended demurrers. Filed Feb'y 1st, 1904. J. H. Finks, clerk.

66 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

On this, Monday, February 8, 1904, came on to be heard the demurrers to the plaintiff's bill filed January 11, 1904, by the defendants, Jennie M. Smythe and James N. Smythe. And said demurrers having been heard by the court, together with the argument of counsel thereon, were by the court in all things overruled. And said defendants Jennie M. Smythe and James N. Smythe were ordered by the court to answer on or before the first Monday in March, 1904. To said rulings and order said defendants then and there duly excepted.

EDWARD R. MEEK,
U. S. District Judge, Northern District of Texas.

Indorsed as follows: No. 597, equity. The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Smythe, *et al.* Filed 8 day of Feb'y, 1904, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

67 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris H. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

Order Overruling Demurrers. March 12, 1904.

Heretofore, on Monday, February 8, 1904, came on to be heard the plaintiff's bill of complaint filed May 19, 1903, and its first amendment to its said bill of complaint, filed December 11, 1903, and the various demurrers to said bill and amendment filed by the defendants other than Jennie M. Smythe and James N. Smythe as follows, to-wit: (1) The demurrers filed July 6, 1903, by the defendants

William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company; (2) the amended demurrers filed January 4, 1904, by the defendant Phillips Investment Company; and (3) the amended demurrers filed February 1, 1904, by the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company. And said bill and amendment and said demurrers and amended demurrers, and the argument of counsel thereon, having been heard, were by the court taken under advisement.

Now on this, Saturday, March 12, 1904, the court having considered said demurrers and amended demurrers, the same, each and all, are by the court in all things overruled. And the said defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, each and all, are ordered
68 to answer in this cause, on or before the first Monday in June, 1904.

To each and all of said rulings of the court each of said defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, then and there in open court duly took exception.

EDWARD R. MEEK,
United States District Judge,
Northern District of Texas.

Indorsed as follows: # 597, equity. The Fidelity Mutual Life Insurance Company, *v.* Jennie M. Smythe, *et al.* Order overruling demurrers. Filed 12 day of March, 1904, at 9 o'clock a. m.; J. H. Finks, clerk, by C. B. Hollarn, deputy. E. Maurice E. Locke, attorney and counselor, Dallas, Texas.

69 In the Circuit Court of the United States, Northern District of Texas.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
versus
JENNIE M. SMYTHE ET AL., Defendants. } No. —.

The Answer of James N. Smythe and Jennie M. Smythe, Defendants, to the Bill of Complaint of The Fidelity Mutual Life Insurance Company, the Complainant.

These defendants now, and at all times, saving and reserving unto themselves, and in nowise waiving, all benefit and advantage of their plea of personal privilege to be sued in the district whereof they and each of them are residents, and saving and reserving all benefit and advantage of exception or demurrer which can or may be had or taken to the errors or uncertainties or other imperfections in said

bill of complaint contained, for answer thereto or unto so much of such parts thereof as said defendants are advised is or are material for them to answer, say as follows:

First. It is true that in the latter part of October, 1896, that said William A. Hunter insured his life, for the benefit of his sister, the defendant, Jennie M. Smythe, then a widow, Mrs. Jennie M. Mettler, in the said Fidelity Mutual Life Insurance Company, the amount of the insurance being fifteen thousand dollars. That complainant's said agent, Andrew J. Brown, and said William A. Hunter were intimate acquaintances and friends at Alvarado, Texas, for a period of several years, the former being a merchant and the latter a book-keeper in that town at said time. That said Andrew J. Brown himself solicited said insurance and wrote out the applications for said insurance,—so defendants are informed and believe; and said insurance was not obtained by any false or fraudulent statements,—as fully appears from the written applications
70 for said insurance, and all of which was fully tried in said former suit.

Second. Defendants deny that said William A. Hunter and the defendant Jennie M. Smythe conspired together from the beginning, or at any other time, and concocted together the alleged fraud, conspiracy or unlawful combination charged in the bill. That the defendant Jennie M. Smythe did not know that her said brother intended insuring his life, and did not know of the existence of said policies until after her brother was drowned in the Pecos river on December 2nd, 1896. That thereafter, and a few days after she was informed of her brother's death, she went to the office of R. D. Gage, lawyer and banker at her home, Pecos city, Texas, to get his advice in reference to the collection of a promissory note due and payable to her said brother, which she had found in his trunk, and Mr. Gage then told her that her brother had left a package of papers in the vault of his bank, and got the papers, which were in a sealed envelope, the contents being unknown to both Mr. Gage and said defendant; and the package was there opened, and it contained said policies of insurance. That said defendant then expressed her surprise and want of knowledge of the fact that her brother's life was insured. That notice of the death of said defendant's brother was afterwards prepared by Mr. Gage and served on the complainant company through the mail. That in response to such notice the adjuster of the complainant company, R. C. Milliken, came to Pecos city, Texas, and was given full information of the facts in reference to the drowning of said William A. Hunter, and of his life and family. That while in Pecos city said adjuster had sent him from the State office of complainant company, at Dallas, Texas, a telegram, stating in substance that said company had had William A. Hunter arrested, and that the officer was then on the way to Pecos city with him. That upon receiving said telegram at Pecos city said adjuster called at the home of the defendant Mrs. Smythe, who was then a widow, Mrs. Jennie M. Mettler, and showed her said

telegram and threatened her and her brother with the peni-
71 tentiary if she did not deliver up the said policies canceled at once; and promised her that if she would do so, he, the said adjuster, would see that neither of them were ever prosecuted. That she ordered him from the house, believing the telegram was false, as it was, and believing in the integrity and honor of her brother. That she brought her said suit against said company on said policies, and won the case without any perjured evidence or any other fraud in the institution or prosecution thereof, as fully appears from the testimony of herself and witnesses of record in this honorable court; and she avers the truth to be that she does not believe that the man William A. Hunter, who has been arrested as her said brother, is her brother, no more than it was her brother arrested according to said telegram. Defendants deny that said William A. Hunter, charged in said bill to be William A. Hunter, ever received one cent of the $24,028.25 recovered by said defendant in her said suit against the complainant company. That she, the said Jennie M. Smythe, believed her brother dead during the five years she was prosecuting her said suit, from 1897 to 1902; and recovering her money on — about June 23rd, 1902, & she has ever since retained the same, believing she was justly entitled to it.

Wherefore, having fully answered to said bill of complaint, defendants deny that the said complainant is entitled to the relief, or any part thereof, in the said bill demanded, or any relief whatsoever; and pray to be hence dismissed with their reasonable charges in this behalf incurred.

STANLEY, SPOONTS & THOMPSON,
W. H. CLARK,
Solicitors and Counsel for the Defendants, James N. Smythe and Jennie M. Smythe.

Indorsed as follows: # 597 Equity. The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Smythe *et al.* Answer of the defendants James N. Smythe and Jennie M. Smythe. Filed 7 day of March, 1904, at — o'clock — m.; J. H. Finks, clerk, by C. B. Hollarn, deputy.

72 Answer of Defendant Morris A. Spoonts.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *vs.* Jennie M. Smythe, James N. Smythe, William H. Clarke, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The Answer of Morris A. Spoonts, One of the Defendants, to the Bill of Complaint of The Fidelity Mutual Life Insurance Company, Plaintiff.

I.

This defendant now and hereafter and at all times saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer *and imperfections in the said bill contained, for answer* thereto, or to so much thereof, as this defendant is advised, it is material or necessary for him to make answer to, answering says:

II.

This defendant says that he is and was a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters
73 and things set forth in said bill of complaint, occurring or existing prior to, to-wit; May 1st 1899, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this;

That this defendant, on to-wit; May 1st 1899, was residing in Fort Worth, Tarrant county, Texas and was an attorney at law profitably engaged in the active business and practice of said profession, and wholly unacquainted with said Jennie M. Mettler and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case. That on or about May 1st 1899, he was in due course of his professional business as attorney at law, consulted and employed by Wm. H. Clarke one of the defendants herein, to assist him, the said Clarke, in the presentation and trial before said circuit court, of said action at law, then depending brought by said Jennie M. Mettler against plaintiff herein to recover on said policies, and so in general way, and from an inspection of the pleadings and testimony in said case, became informed of the issues of law and fact to be so presented and tried in said action and court, and that the right of Jennie M. Mettler to recover was dependent upon proving indirectly by facts and circumstances the death of W. A. Hunter prior to the filing of said suit, there being no person having nor claiming to have personal knowledge of his death, which fact of death was disputed and denied by plaintiff herein, then in that action defending. That Wm. H. Clark was a reputable person and an attorney at law of good professional ability, character and long and honorable standing That it is and was not unusual, in the practice of the profession, for an attorney at law to consult with and employ some other attorney at law to assist him in the presentation and trial of important cases, nor for such attorney, when so consulted and employed, to appear and represent professionally the client of the attorney so employing him without objection; and this defendant, so employed by said Clarke, did assist him in the trial of said action at law and in the presentation thereof to the court
74 and jury, in consideration of which professional services by this defendant so rendered at the instance and request and for the benefit of said Clarke; he charged and said Clarke paid to this defendant therefor the reasonable sum of fifteen hundred ($1,500.00) dollars; that as a means of making such payment, and in discharge of the personal obligation of said Clarke so to do, and for no other purpose, said Clarke requested the clerk of said court wherein said suit was presented and tried, and services and judgment rendered, to pay to this defendant said sum, which payment said clerk did make by means of his personal check or draft upon the American National Bank of Dallas, about June 3rd 1902, in favor of this defendant, or order for said sum, which check or draft was not presented for payment nor collected by this defendant, but was by this defendant in due course and usage of commercial business indorsed in blank and sold and delivered to the Fort Worth national bank, of Fort Worth, Texas, who was then and there lawfully engaged in such banking business, and became the owner thereof, and the amount thereof was by it placed to the credit of this defendant as a money deposit in said bank, subject to be and was

checked out by this defendant and his check paid by said bank in due course of such business. That during all said time and transactions there was no contract relations express nor implied existing between this defendant and said Jennie M. Mettler, plaintiff in said action at law, and no confidential fiduciary or other relation existing between them, and this defendant had no other or further relation or connection with said action at law, nor with the facts nor matters in controversy, than said professional assistance and service so rendered for said Clarke, and had no knowledge information, belief nor suspicion that said W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds; nor that any fact, alleged or proven, by or for said Jennie M. Mettler, in said action at law was false or fictitious, nor that any witness or testimony in her behalf was perjured,
75 false or untrue, nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor other than was produced at the trial of said cause and then equally known to plaintiff herein. That whether the fifteen hundred ($1,500.00) dollars alleged to have been paid to this defendant was in fact ultimately or actually paid from money of plaintiff herein, provided for the purpose, this defendant had and has no knowledge nor information except from the allegations of plaintiff's bill, and therefore leaves plaintiff to make such proof as it may be able to produce as to that fact.

IV.

This defendant says that if it be true as alleged by plaintiff that it deposited with the clerk of the court in which said action at law was tried and judgment rendered, money sufficient and with the purpose and direction to pay and satisfy in full said judgment and costs in favor of Jennie M. Mettler, and that said judgment was wrongfully obtained and that fifteen hundred ($1,500.00) dollars of said deposited money was paid by said clerk to or by direction of Wm. H. Clarke or Jennie M. Mettler to or for the benefit of this defendant, nevertheless, said judgment was a record contract obligation of the highest dignity, as evidenced, importing verity and binding upon plaintiff herein until annulled by payment or judicial action; that plaintiff herein paid and performed said judgment obligation in money and intended so to do; and the clerk of said court and said Jennie M. Mettler and said Wm. H. Clarke, having received said money as payment, and having paid it out as current money and lawful medium of exchange in payment or discharge of their several obligations and duties, and by direction and consent of plaintiff, the legal title to said money vested in those to whom it was so paid in due course of business dealing, who took it without notice of the wrong or fraud perpetuated on plaintiff, if any there was perpetrated, which is not admitted, and such innocent takers of the legal

title and possession, including this defendant, cannot in equity nor good conscience be required to refund said money, nor to account to plaintiff therefor in this suit.

76 V.

This defendant says that he is not, and was not, as alleged or implied in plaintiff's bill, an assignee of said policies or judgment or contract, nor of any part thereof, nor of all or any part of any claim or demand or chose in action or contract right or contingent interest in them, nor of any recovery, and while he may have believed that Wm. H. Clarke had an interest in the said policies or judgment or proceeds thereof, when collected, and that said Clarke was paying or intending to pay his said obligations to this defendant from the proceeds of the payment of said judgment, this defendant took it from and as the money of Clarke, in payment of the debt obligation of Clarke for legal service of that value rendered by this defendant to said Clarke, and released Clarke from all and further obligations in due course of business and not as a payment of said judgment or any part thereof or interest therein, and this defendant says that plaintiff intended to discharge its apparent legal duty and obligation to Jennie M. Mettler, and to satisfy said judgment by payment with money, and that the same should be current money free from all equities and further control of plaintiff.

VI.

This defendant says that he did have notice that plaintiff herein as defendant in said action at law, denied that said W. A. Hunter, was dead, and that said fact was a material issue in said action at law, tried, contested and decided in favor of said Jennie M. Mettler and against plaintiff herein upon sufficient proof of circumstances and other facts, and that a verdict of the jury upon said issue and by the approval thereof and judgment thereon by said court in said action at law, the fact that said W. A. Hunter was then dead and was before the filing of said action at law, was legally proven and established by competent evidence in the mode and manner recognized and provided by law in that court having full jurisdiction, and all further doubts, disputes, controversy and contention as to that fact and as to the liability of this plaintiff to pay to said Jennie M. Mettler in current money the amount so there found and adjudged was forever ended and solemnly adjudicated, and in all things
77 finally affirmed by the Supreme Court of the United States, and afterwards by plaintiff herein recognized, observed, obeyed and knowingly and intentionally paid in money to said Jennie M. Mettler or her order, the amount of money so adjudged to be recovered by her. That the validity and justness of said finding, verdict and judgment was no longer questioned denied nor disputed by plaintiff herein, nor open to such dispute, and not until long after this defendant had received from said Clarke payment for said

professional services at the time and manner above set forth and had expended the same in due course of business after plaintiff claim, intimate or assert that W. A. Hunter was not, in fact, dead, nor the said judgment or its payment was wrongfully or fraudulently obtained. This defendant says that said verdict of the jury and said judgment determining said issue, cannot now be annulled nor set aside, nor said issues of law or fact again tried, retried or contested in this court, and that plaintiff's remedy if any it has, is full and adequate at law in damages for the wrong do*en* it, if any was in fact done, in obtaining said judgment and payment against those persons guilty of such fraud or wrong, and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant an innocent taker in good faith for value in due course of business from the hand of said Clarke without notice of any fraud or wrong done or intended toward plaintiff, or in any equity of plaintiff therein, and after solumn adjudication of said controverted issues and facts.

VII.

This defendant says that he is and was a stranger to and without knowledge or information of the supposed contracts and dealings between Jennie M. Mettler and Alexander, Clarke, and Hall, and between said Alexander and Clarke, and between said Hall and Clarke, and between Jennie M. Mettler and Clarke, and between plaintiff and W. A. Hunter and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; without this, that if be true that such supposed contract- exist*s* and existed at the alleged dates thereof, this defendant believes, and has reason to believe, that the same have all been fully performed, and that said Clarke and Alexander and Hall, acted as attorneys at law in good faith and without intention, purpose or notice of any wrong or
78 fraud toward the plaintiff herein, and that said Clarke, became and was an innocent purchaser for value and good faith of such interest in said policies or judgment or money, and without notice o*n* intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if any there was in fact by said W. A. Hunter and Jennie M. Mettler or either of them which is not admitted but denied, and without any knowledge, notice or information that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony in the trial of said action at law were false or fictitious.

This defendant says, from information derived from the allegations of plaintiff's bill, that the assignment of an interest in said policies, judgment and recovery for and upon the consideration of the contractual undertaking of said attorney, or attorneys, to render and perform in the future certain necessary and legal professional services in the recovery and collection of said money judgment, and which service so undertaken said attorneys were bound to, and did

render in payment for such property interest in good faith, without notice of any wrong intended or done plaintiff, constituted such attorney or attorneys, an innocent purchaser for value in good faith, without notice of any equity of plaintiff, and created in said Wm. H. Clark an equity and title in and to the money so recovered and paid, superior in all things to the pretended equity of plaintiff, and this defendant, in taking payment of his own demand from said Clark, took it free from any taint of wrong or equity of plaintiff, and by a right and title in all things superior.

VIII.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, or that is sought to be established to his prejudice without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed traversed and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain
79 and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

MORRIS A. SPOONTS, Defendant.

STANLEY, SPOONTS & THOMPSON,
Solicitors for said Def't.

Endorsed as follows: No. 597 In equity. The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Smythe *et al.* Answer of defendant Morris A. Spoonts. Filed May 31, 1904. J. H. Finks, clerk.

80 In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *vs.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Philips Investment Company, Defendants.	No. 597.	In Equity.

Original Answer of Defendant Philips Investment Company to Plaintiff's Bill and Plaintiff's First Amendment of its Original Bill of Complaint.

The defendant, Philips Investment Company, now and at all times hereinafter saving and reserving to itself all manner of benefit

and advantage of exception and demurrer to the many errors and insufficiencies in complainant's original bill of complaint contained and the amendment thereto, and for answer thereunto or unto so much and to such facts thereof as this defendant is advised is material for it to make answer unto, answers and says:

This defendant admits that it, the Phillips Investment Company, is a private corporation duly incorporated by the State of Missouri, long prior to October 29, 1901.

This defendant admits the allegation contained in subdivision 4 in paragraph 6 of plaintiff's bill.

Defendant denies the allegation in subdivision 5 of paragraph 6 of the bill to the effect that the clerk of the said circuit court on June 3, 1902, paid out to the defendant, Philips Investment Company the sum of fifteen hundred and forty and 25/100 dollars, but says that the facts with respect to said payment are more ac-
81 curately set out in the amended bill.

That as to each and all of the other averments contained in plaintiff's bill, this defendant says that it can neither affirm nor deny the same, for the reason that it is not advised of the truth or lack of truth in the said averments contained; but this defendant says that its knowledge and connection with the subject-matter is truthfully and fully set forth hereinafter in its special plea and answer.

This defendant admits the averments contained in plaintiff's first amendment to its original bill, in the paragraph marked "7½," to this extent alone, namely; that its connection with the subject-matter of the litigation, which was remote, as hereinafter more particularly set forth in its special answer, has been characterized by the utmost good faith and without notice of the fact that one William A. Hunter was connected with the subject matter of such litigation, and without knowledge of the issues involved.

This defendant disclaims any knowledge of the matters further contained in said paragraph 7½ of plaintiff's first amendment of its original bill of complaint, and says that it can neither affirm or deny the truth of the allegations, except with respect to the following pertaining to this defendant.

Defendant says that the averments in said amendment of plaintiff's original bill, as follows:

"The sum of fifteen hundred forty and 25/100 dollars, received by Phillips Investment Company, as set forth in section 6 of this bill, was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25/100 dollars, drawn June 3, 1902, on the American National Bank of Dallas, Phillips Investment Company endorsed said check and transferred the same to the Bank of Montreal, which endorsed the same and transferred it to the Fourth Street National Bank of Philadelphia, which, in term, endorsed the same and transferred it to the City National Bank of Dallas and to said bank it was paid June 16, 1902, through the

Dallas clearing house by the American National Bank of
82 Dallas. Said payment was made to said Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6, of this bill. By said assignment under date of October 29 1901, William H. Clark, assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows; 'All my right, title and interest, that is my contingent attorney's fees of about $8000.00, in the cause of action and judgment of about $21,550.00 rendered thereon on the 4th day of July 1900, in the United States circuit court of the northern district of Texas, at Dallas, in the life insurance case of Jennie M. Mettler *vs.* Fidelity Mutual Life Association of Philadelphia, numbered 2118, said judgment rendered as aforesaid, in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States.' Said assignment was given as collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy one and 57/100 dollars, together with interest thereon at the rate of 8 per centun per annum from date, such interest to be paid semi-annually, and each installment thereof to bear interest at the rate of ten per centum per annum from its maturity. Said note was given for a pre-existing indebtedness. Said assignment was filed with the clerk of the court December 2, 1901 when said assignment was given and accepted, and when it was filed in the circuit court, said cause was pending in the Supreme Court, to which the plaintiff had removed it by a writ of error filed September 1 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900," are true, but do not con-
83 tain all the material facts which sustain the meritorious defense on the part of this defendant, and which are more particularly set out hereinafter.

This defendant especially denies the allegations in plaintiff's said amended bill, as follows:

"In accepting such assignment of such cause of action and such suspended judgment, Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff, as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe, and does believe, and so alleges that in accepting said assignment Phillips Investment Company was acting under advice of attorneys, the aforesaid William M. Alexander, and William Thompson, then doing business as co-partners under the firm name of Alexander & Thompson. Said Alexander & Thompson when they advised Phillips Investment Company to take such assignment had actual knowledge, as aforesaid, that this plaintiff by its pleadings filed in said cause, denied that William A. Hunter had died as

alleged. This plaintiff further has reason to believe and does believe and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of the alleged death of said William A. Hunter, and that this plaintiff denied that he had died as alleged. Sometimes, however, Phillips Investment Company pretends that it can disregard said assignment and rest its rights upon the check given it by the clerk of the court, as aforesaid, and upon its surrender of said note in exchange therefor. As to this plaintiff avers the truth to be, that said check was given solely and because of and in pursuance of said assignment. And, further, it avers that in accepting such check and surrendering such note Phillips Investment Company was represented by, and acted only through, its said attorneys, Alexander & Thompson; and that they then and there had full knowledge of the main issue involved in said litigation, and knew that the plaintiff had always denied that William A. Hunter had died, as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff
84 further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for said check, but accepted the same in discharge of antecedent indebtedness."

For further and special answer, and in addition to those allegations contained in plaintiff's amended bill which are expressly admitted herein, this defendant says that William H. Clark one of the defendants in this cause was, in October 1901, indebted to this defendant in a sum of between $1300 and $1400, which was evidenced by his promissory note that at the solicitation of William H. Clark this defendant gave him an extension for the time of payment of said note, in consideration of which the said William H. Clark executed a written transfer as collateral security wherein he conveyed his interest in the subject-matter of the judgment in the cause of Jennie M. Mettler *vs.* Fidelity Mutual Life Association of Philadelphia.

This defendant says that it was advised at the time that an appeal was pending from said judgment, and that the cause was to be heard and determined finally by the Supreme Court of the United States. But this defendant says that it parted with nothing of value to it, by reason of the security afforded it in the transfer of the interest of said Clark in said judgment, other than the extension of the time of maturity of said note.

This defendant says that it did not investigate into the merits of said cause and did not become cognizant of the issues involved in said cause. Defendant says that the said William H. Clark, had previously been its attorney for many years in connection with W. M. Alexander, and that it was content to deal with said William H. Clark without employing an attorney to represent its interests in connection with said security.

Defendant says that it retained the said note, secured, as aforesaid by the transfer of the interests of William H. Clark in said judgment.

That afterwards to wit in May, 1902, the clerk of the circuit court of the United States for the northern district of
85 Texas, at Dallas, communicated notice to it, through Alexander & Thompson, that it would under the orders of the court pay the amount of said note held by it against William H. Clark, upon the surrender of said note. This defendant says that thereupon it mailed from Kansas City to Alexander & Thompson, at Dallas, Texas, the note of William H. Clark, as aforesaid, amounting, principal and interest to $1540.25, and did a few days thereafter receive a check drawn by the clerk of said court, in manner and form as set out in plaintiff's amended bill.

This defendant says that it is informed, believes, and so alleges, that the said note executed by William H. Clark, and mailed by this defendant to Alexander & Thompson, was surrendered to the clerk of the court and was, under the orders of the court, cancelled and surrendered by the clerk of the court to William H. Clark.

This defendant says, furthermore, that it is informed, believes, and so alleges, that the said William H. Clark, was, during the months of May and June, 1902, possessed of large funds and was amply able to pay said note, and would have paid the same on presentation, and said note would have been presented to him and would have been paid to this defendant, except upon the notification by the clerk of said court that he was ready to pay the same upon presentation to him.

This defendant says that it would not have made surrender of said note to the clerk of the court, except upon the belief that this honorable court, in disbursing the fund in question, would protect this defendant, which parted with the possession of the note only upon the consideration of the payment being made to it, and defendant relied in good faith upon the power and duty of the court to protect it under the circumstances.

And this defendant says that without default or neglect on its part but upon the reliance on its part in the conclusive finality of the judgment of the Supreme Court of the United States,—which judgment had been voluntarily paid by the plaintiff, so this defendant alleges on information and belief, and upon the faith in this honorable court in distributing the fund, and calling upon
86 this defendant for the surrender of the note, this defendant pleads that it is entitled to the protection of the court.

Defendant says, furthermore, that it is advised, believes, and so alleges, that the said William H. Clark is now unable to pay the amount of said note, and defendant has long since parted with the possession of said note, which was surrendered, as aforesaid, by the clerk of the court and cancelled, and the circumstances will not admit of this defendant being restored to the position that it was at

the time it was invited, as aforesaid, to surrender, and did surrender, its evidence of indebtedness into the custody of the court.

This defendant specially denies that it had any knowledge, prior to the institution of this suit, of the issues involved in said cause, and it denies that it had parted with any material consideration, or would have done anything to effect its status by virtue of said assignment, as a creditor of said William H. Clark's, except to extend the time of payment of said note.

This defendant says that it parted with the possession of said note upon the faith in the virtue of the final judgment in said cause, and upon faith in the virtue of the orders of this court, in directing payment to it of the amount of the note and interest, and upon the surrender of the note and the cancellation of the same; and this defendant did and performed these acts without notice, but as a stranger to the merits of the said cause; wherefore, it says that in good conscience and equity it is entitled to the protection of the court as against the claim of plaintiff.

This defendant says that such action as was taken in its behalf by Alexander & Thompson was purely gratuitous and did not involve the relations of attorney and client. This defendant says that the said Alexander & Thompson advised this defendant that they could not act as attorneys adversely to the said William H. Clark, who had previously been associated with them as a partner for years; and defendant says that there was no occasion for it to invoke the services of attorneys, but that it dealt directly with William H. Clark with respect to the subject-matter, and such
87 services as were rendered by Alexander & Thompson, as above stated, were gratuitous, not those of attorney to client, and not of an advisory character.

All of which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall direct, and hereby prays that it be discharged hence with its reasonable costs in this behalf sustained; and defendant prays that the final decree rendered herein fully protect this defendant in all respects as should obtain under the facts in a court of equity; and defendant prays for all relief, general and special.

(Signed) ALEXANDER & THOMPSON,
Solicitors for Defendant Phillips Investment Company.

THE STATE OF MISSOURI, }
County of Jackson. }

Frank Stanley Young, being duly sworn, says, that he is agent for the defendant, Phillips Investment Company, and is the only person who acted for the Phillips Investment Company with respect to the matters set forth in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein

stated on information and belief, and as to such matters he believes them to be true.

(Signed) FRANK STANLEY YOUNG.

Sworn to and subscribed before me, this the 27th, day of May, 1904.

(Signed) JOHN C. MEREDITH,
Notary Public, Jackson County, Missouri.

My term expires June 7th, 1906.

[SEAL.]

88 & 89 The foregoing endorsed as follows:—
No. 597. Equity. The Fidelity Mutual Life Insurance Co., plaintiff *vs.* Jennie M. Smythe *et al.*, defendants. Original answer of defendant, Phillips Investment Company, to plaintiff's bill and first amended bill of complaint. Filed June 1st, 1904. J. H. Finks clerk.

90 In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Texas.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff, *vs.* JENNIE M. SMYTHE, JAMES N. SMYTHE, WILLIAM H. CLARK, CHARLES A. CULBERSON, MORRIS A. SPOONTS, and PHILLIPS INVESTMENT COMPANY, Defendants.	In Equity.	No. 597.

The Answer of William H. Clark, One of the Defendants, to the Bill of Complaint and the Amendments Thereto of The Fidelity Mutual Life Insurance Company, Plaintiff.

I.

This defendant now, and at all times, saving and reserving unto himself, and in no wise waiving, all benefit and advantage of exception or demurrer or otherwise, which can or may be had or taken to the errors and uncertainties or other imperfections in said bill of complaint, and the amendment thereto contained, for answer thereto, or unto so much of such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, says as follows:

II.

This defendant says that he is, and was, a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4,

and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant
91 denies all and all manner of fraud and unlawful combination, confederacy or conspiracy wherewith he is charged, or sought to be charged, prejudicial or affected by allegation or imputation, implication, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is, and was, a stranger and without any information or knowledge as to any, all and singular, the matters and things, set forth in said bill of complaint, and the amendment thereto, occurring or existing prior to the time the said Fidelity Mutual Life Association, of Philadelphia, declined to pay its said policies to said Jennie M. Mettler, on the ground that her proofs of death insufficiently showed the death of said William A. Hunter; and is and was in no wise a party to any and every pretended or supposed wrongful, fraudulent, speculative, commercial or improper motive, purpose, acting, combination or confederacy, theretofore or thereafter charged in said bill and the amendment thereto against him; that this defendant was wholly without notice giving him actual or constructive knowledge thereof, and therefore this defendant leaves the plaintiff to make such proof thereof as it may be able to produce, without this: That this defendant on, to-wit: October 27th, 1897, the time of his employment as attorney as aforesaid, was residing in Dallas, Dallas county, Texas, and was an attorney at law, profitably and exclusively engaged in the active practice and business of said profession, having practiced law in Dallas since 1885. That this defendant was wholly unacquainted with Jennie M. Mettler, and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case prior to his being solicited and requested to institute suit for her against said Fidelity Mutual Life Association upon its said policies.

That R. D. Gage, then and now an attorney at law and banker, of Pecos city, Texas, of excellent and reputable standing, and a
92 most — citizen, and personally and well and long known to this defendant as a gentleman of the highest integrity and superior intelligence and education, acting for and in behalf of the said Jennie M. Mettler, prior to the making of said power of attorney of October 27th, 1897, referred to by plaintiff,—informed and advised this defendant of the circumstantial evidence Mrs. Mettler had in support of her said claim—being substantially that introduced in evidence by her upon the subsequent trial of her said suit, and solicited and requested this defendant to institute suit for her against said association, at Dallas, Texas, assuring this defendant that he, the said Gage, believed that said William A. Hunter was drowned as averred by Mrs. Mettler; that he was acquainted with both of

them, and that they were honorable, intelligent and respectable citizens, and that, in his opinion, the said Mrs. Mettler was urging her said claim in good faith; and this defendant, believing in, and then and now having the utmost confidence in the good faith of the said Gage in any representations, statements and assurances made by him to this defendant in such a matter, this defendant accepted said employment from Mrs. Mettler, for and in the name of his said law firm, after consulting with his said partners, W. M. Alexander and W. L. Hall, in reference thereto, they agreeing with this defendant that the employment should be accepted; and thereupon said power of attorney of October 27th, 1897, was made.

That said R. D. Gage first suggested and advised that said suit be brought for Mrs. Mettler at Dallas, Texas, for the reason that said Fidelity Mutual Life Association of Philadelphia had no agent upon whom service could be made in Reeves county, Texas, of which county said Pecos city was the county seat, preventing the institution of the suit at Mrs. Mettler's home, to-wit, at said Pecos city, Texas; and as she had to bring the suit away from home, and as it would be adjudicated in the Federal court, on account of the Fidelity Mutual Life Association being a foreign corpo-
93 ration, he, the said Gage, advised and she, the said Mrs. Mettler, desired and decided to institute her said suit at Dallas, Texas, for the recovery of said policies, without being influenced so to do by this defendant or his said law partners.

IV.

This defendant says that it is true that on or about October 27th, 1897, Jennie M. Mettler employed said Alexander, Clark & Hall, to institute and prosecute her said suit against said Fidelity Mutual Life Association of Philadelphia upon said policies of insurance; and agreed to give them for their legal services a contingent fee of one-third of whatever sum might be recovered by suit or compromise; and thereafter, on, to-wit, October 27th, 1897, entered into a written power of attorney and contract of that date, embracing therein, among other things, said power of attorney and agreement. That thereafter, on or about June 10th, 1899, said law firm of Alexander, Clark & Hall, having been, by mutual consent, dissolved, and the firm of Alexander, Clark & Thompson formed, she entered into a like power of attorney and contract with Alexander, Clark & Thompson and W. L. Hall, in lieu of and in substitution of the former, the latter being the same as the former, except in this, it provided for the employment of associate counsel by her said attorneys, and gave to them in addition to said one-third of whatever might be recovered, the further contingent sum of $2500.00, and whatever statutory attorney's fees that might be recovered, out of which her said attorneys were to pay said associate counsel; and on, to-wit, said 10th day of June, 1899, entered into another written power of attorney and contract of that date, embracing therein, said power of attorney

and new contract aforesaid, in lieu of and in substitution of said former written power of attorney and contract.

Defendant avers that the said Mrs. Mettler was a widow, and poor and wholly unable and without the funds, and unable to procure the funds to pay her said attorneys a reasonable fee for their
94 legal services to be rendered, otherwise than by a contingent fee out of whatever she might recover. That said first and second contracts were merely intended to provide for said employment and said contingent fee,—which was a very usual and proper contingent fee in cases such as hers, involving the contest of a close and doubtful case through the Supreme Court of the United States—the principal doubt being whether her testimony, said circumstantial evidence, was sufficient to establish her cause of action by a preponderance of the evidence; and this defendant expressly denies that he, or his said firms, speculated or traded in any manner whatsoever in or pertaining to said cause of action or said suit of said Jennie M. Mettler, or acquired any interest therein other than their said contingent fee; or that they or either of them, instigated, instituted or prosecuted said action for the common benefit of said Jennie M. Mettler and themselves, or either of them; but avers the truth to be that he and his said partners entered into said attorneys' contract, and instituted and prosecuted said suit in the exercise of his and their proper and lawful functions as attorneys at law, and in so doing acted in good faith, and for the honest purpose of protecting the interest of their client, the said Jennie M. Mettler, and not for any purpose of speculation or trade, as alleged by plaintiff. That, under and by virtue of the law in this State, as established by the supreme court of Texas, this defendant and his said partners were lawfully authorized to make said contract as attorneys for said contingent fee, without becoming parties to the suit or parties in interest, and without being held responsible for the duties and liabilities resting upon their said client, the litigant; and are in nowise responsible or chargeable with the fraud of their client, if any, for that they merely entered into said contract of employment and obtained and treated said written attorneys' contracts as private and confidential papers between client and attorneys; and kept said attorneys' contracts with their private papers until the end
95 of the litigation, and then filed the same in court merely as evidence for the clerk of the court at Dallas, Texas, of authority from their client, who was absent at her father's home at Homer, Ohio, to collect and disburse for her the check given by the plaintiff to said clerk for her; and avers that all he did was strictly in line of his duty as attorney for the said Jennie M. Mettler, and that he is in nowise chargeable with or liable for her wrongful acts, if any.

V.

This defendant says that it is not true, as alleged in section 7½ on page 3 of the amendment to plaintiff's bill, that this defendant received his said fee of $8,346.00 solely by reason of and in pursuance

of said two attorneys' contracts; but avers the truth to be, which plaintiff knew, or easily could have learned, that this defendant, in addition to giving Mrs. Mettler therefor his faithful and laborious professional services in said case for a period of about five years,—for which alone said fee would have been in nowise excessive, he also gave to said Alexander & Thompson for their interest in said contingent fee about $1100.00, on or about January 1st, 1900, prior to the rendition of said judgment in July, 1900; and gave to said W. L. Hall about $900.00 for his interest therein, after the rendition of said judgment and before its affirmance by the United States Supreme Court.

That on or about January 1st, 1900, said firm of Alexander, Clark & Thompson was, by mutual consent, dissolved, as aforesaid; and in an amicable, proper and just division of the business and fees of the firm, this defendant, who had been given said Mettler case in the division of the business, gave to said Alexander & Thompson, his one-third interest in certain fees in fire insurance cases of the firm, said fees being of the reasonable value of about $1100.00,—the business of the fire insurance companies owing said fees to said firm having gone to said Alexander & Thompson in said division of said partnership business.

96 That upon the dissolution of said firm of Alexander, Clark & Hall, on or about January 1st, 1899, said Hall retained his connection with said Mettler case and his interest in said contingent fee—and so retained the same until after the trial and the rendition of said judgment therein; and thereafter, in consideration of two certain lots owned by this defendant in South Dallas, and in consideration of being relieved of the preparation of said cause for trial in the Supreme Court of the United States, he gave this defendant his interest in said judgment. That in pursuance of this settlement this defendant afterwards conveyed said two lots to said Hall, the same being then of the reasonable value of about $900.00.

That, while it is true, as alleged on page 6 of plaint-ff's bill, that said W. M. Alexander, William Thompson and W. L. Hall assigned and transferred in writing on May 29th, 1902, after the affirmance in said judgment, by endorsement thereon, all their interest in said contracts of employment of October 27th, 1897, and of June 10th, 1899,—such endorsements were then made for said consideration already received by them as aforesaid.

That this defendant in so purchasing said interest of his former partners in said contingent fee did not do so as a speculation or investment, but properly did so in order to have an adjustment and settlement of their partnership business, which was mutually desirable, their relationship as partners having ceased. All of which this defendant did because of his confidence in the justness of said cause.

That this defendant so parted with his said years of professional services and with about $2000.00 in said fire insurance fees and said two lots without any fault on his part, and in an honest and faith-

ful effort to do his duty in the due course of his professional work, to his client and his former partners.

This defendant says that it is not true, as alleged in plain-
97 tiff's bill on page 9, that the legal services of the defendant-Morris A. Spoorts and Charles A. Culberson were rendered in consideration of this defendant assigning and transferring to the former an interest of $1500.00 and to the latter an interest of $1026.00 in this defendant's said attorney's contracts; but avers the truth to be, that in May, 1899, this defendant employed said Spoonts, as was necessary and proper, to assist him in the conduct of said suit, in the trial court, and in 1901 employed said Culberson to assist him in the conduct of said cause in the Supreme Court of the United States, and agreed to pay, and did pay, said Spoonts for the legal services so rendered by him said proper and reasonable fee of $1500.00, and agreed to pay, and did pay, said Culberson on account of the legal services so rendered by him, in part payment of such services, the sum of $500.00, and $26.00 for the printing of briefs at Washington, paid for by him—and in addition thereto, he, the said Culberson, was paid for his legal services, by the said Jennie M. Mettler, as she agreed to do at the time he was employed, the further sum of $500.00; that his said fee of $1000.00 was proper and reasonable compensation for the legal services so rendered by him. That in associating said Spoonts and said Culberson with him in said cause, as aforesaid, this defendant acted strictly in the line of his functions and duty as an attorney at law, and only did what is usual and proper under such circumstances.

VI.

This defendant says that said two contracts of said Jennie M. Mettler for a contingent fee, the first with Alexander, Clark & Hall, and the second with Alexander, Clark & Thompson and W. L. Hall, cannot, and never could be made the basis to constitute any claim for or against any one herein, for that the second contract undertook to deprive said Jennie M. Mettler of the power to compromise her said cause of action, and to end the litigation, and is therefore
98 null and void; & the first contract was canceled and revoked and abandoned by the parties thereto before the rendition of said judgment.

VII.

This defendant says that the said judgment in favor of Mrs. Mettler and against the plaintiff, was rendered on the 4th day of July, 1900, for the sum of $21,550.00, with interest thereon at the rate of six per cent. per annum from and after said date, and costs of suit. That the amount of said judgment was made up as follows: $15,000.00 allowed as the face of said three policies, $2,250.00 allowed as legal interest on the policies, $1,800.00 allowed as statutory damages and $2,500.00 allowed as statutory attorneys' fees. That said cause was carried by said defendant to the Supreme Court of the United States,

and heard at its October term, 1901, and on May 5th, 1902, the judgment of this court was affirmed by the Supreme Court.

That on, to-wit, June 3rd, 1902, the Fidelity Mutual Life Insurance Company, before said judgment had become collectable,—no mandate having been returned from the Supreme Court to the trial court, and not being returned until June 17th, 1902, and prior to the issuance of execution, and before execution could have issued,—did voluntarily pay to J. H. Finks, the clerk of this court, for said Jennie M. Mettler, in satisfaction of her said judgment, principal and interest, to-wit, $24,028.25.

This defendant says that on said June 3rd, 1902, the Fidelity Mutual Life Insurance Company gave to J. H. Finks, clerk of this court, its check, payable to his order, on the Exchange National Bank of Dallas, for said sum of $24,028.25, in full satisfaction of said judgment, and said clerk endorsed said check and deposited it in the American National Bank, of Dallas, in his name, for the use and benefit of said Jennie M. Mettler, and in this way the bank became indebted to said Clark, for the use and benefit of said Jennie M. Mettler, in said sum. That on or about said 3rd day of June, 1902, said Jennie M. Mettler, then being at her father's home at Homer, Ohio, by and through her duly authorized attorney,
99 this defendant, William H. Clark, collected said sum of $24,028.25 from said clerk, by his certain checks drawn on said American national bank, in accordance with her order and request, by and through her said duly authorized attorney, acting under her instructions, as follows, to-wit: To said Jennie M. Mettler, through her attorney, William H. Clark, $11,616; to William H. Clark, $8,346.00: to Morris A. Spoonts, $1,500.00; to Charles A. Culberson, $1,026.00; and to the Phillips Investment Company, $1,540.25. That this settlement with the clerk was the equivalent of, and intended as, the paying by him to said Jennie M. Mettler of said $24,028.25, and she paying to the defendant Charles A. Culberson said $500.00; and to the defendant William H. Clark, $11,912.25, and his paying to the defendant Morris A. Spoonts $1,500.00 and to the defendant Phillips Investment Company $1,540.25, and to the defendant Culberson $526.00 in accordance with the lawful, just and fair understanding and agreement between the parties. That said checks were issued by the clerk directly to said parties, at the request of the defendant William H. Clark, for the amounts due them respectively, in order to simplify the transaction.

That this defendant, acting as her attorney, under and by virtue of authority from her, the said Jennie M. Mettler, collected her said $11,616.00 check from the said American national bank, and, upon instructions thereafter received from her, remitted same to her at Homer, Ohio, by New York exchange on the 23rd day of June, 1902; and collected his said $8,346.00 check from said American national bank, and deposited the money in the National Bank of Commerce, of Dallas, to his account—and afterwards drew checks thereon, in favor of various and sundry creditors of his, to the full

amount thereof and now has no part thereof, or any property, real, personal or mixed, into which, or on account of which the same was, or is, invested or spent—all of which he is ready to verify. That said other checks the clerk, properly and lawfully, as heretofore set out, delivered to the parties, or their duly authorized attorneys, and
100 the same were paid in due course by the American national bank. That the clerk's said check to the Phillips Investment Company was given at the request of this defendant, in satisfaction of this defendant's indebtedness to it, in the sum of said check. That in disbursing said $24,028.25 for said Jennie M. Mettler, according to her wishes and instructions, and in receiving said check for $8,246.00 and collecting same for himself, this defendant had no knowledge, information or suspicion that said W. A. Hunter was not in fact dead; nor that said suit was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds, by said Jennie M. Mettler—if such be true in reference to her; nor that any fact alleged or proven, by or for said Jennie M. Mettler was false or fictitious, if such be true; nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demand, other than was produced at the trial of said cause, and shown by the record thereof on appeal, and known alike to the twelve jurors who rendered the verdict, and to the judges of the Supreme Court who were of the opinion that the evidence sustained the verdict, and affirmed it; and this defendant has done nothing in the institution or prosecution of said action at law, or in disbursing, as aforesaid, the $24,208.25 paid by the plaintiff's check to the clerk for said Jennie M. Mettler, except what was clearly his right and duty as one of her legal representatives, and having acted in the due course of his professional business, he is not liable to the plaintiff, even should said Jennie M. Mettler be found guilty of the wrongs charged against her.

VIII.

That said Alexander, Clark & Hall, having full confidence in the sincerity and good faith of their client, the said Jennie M. Mettler, in the matter of her claim against said Fidelity Mutual Life Association of Philadelphia, at her instance and request, under
101 and by virtue of their said employment as her attorneys, acting in due course of their professional duties and powers, did institute for her, on, to-wit, January 8th, 1898, her said suit against said Fidelity Mutual Life Association of Philadelphia, in the district court of Dallas county, for the 44th judicial district of Texas; and said suit was removed by the defendant therein to the circuit court of the United States for the northern district of Texas, at Dallas; but this defendant, nor none of said attorneys for Mrs. Mettler, attempted to push said suit to an early trial, but were all and each of them willing to continue the case by consent from term to term, in order to give the defendant any and all reasonable time in which to satisfy

itself of the death of said William A. Hunter,—which said attorneys never doubted, and so advised the attorneys representing said Fidelity Mutual Life Association in said suit,—all of which was done with the full knowledge and approval of the said Jennie M. Mettler; but the defendant, to the contrary, insisted upon and urged for an early trial of said suit, and opposed plaintiff's application for a continuance, and forced plaintiff to trial against her will, at the time of the trial and rendition of judgment in her favor.

IX.

This defendant says that he had no notice which gave him actual, implied or constructive knowledge that said W. A. Hunter was not dead; that this defendant is informed & believes & so avers that the plaintiff, upon receiving notice of the death of W. A. Hunter from Mrs. Mettler, sent its duly authorized agent and representative R. C. Milliken, to said Pecos city, Texas, in January, 1897,—who, upon arriving there, with her permission, undertook for her the preparing and having made and executed the affidavits of the proofs of death, and did obtain many such affidavits of the proofs of death, which he stated to Mrs. Mettler were satisfactory and sufficient—and yet, on or about the next day did return to see her, and stated in
102 substance that he considered it his duty to tell her, before leaving, that he was satisfied the said W. A. Hunter, her brother, was not dead; and before leaving Pecos city he caused a telegram to be sent him at Pecos city, from the State office of the plaintiff, at Dallas Texas, to the effect that her said brother had been arrested and was then being brought to Pecos city, and showed said telegram to her, and threatened to send her and her brother to the penitentiary unless she would cancel and surrender said policies to him, in which event he promised that neither she or her brother would be prosecuted, and that he would have her brother released from arrest. That while this defendant was informed of and had notice of this, the first claim of the plaintiff that said Hunter was not dead, before the institution of said Mettler case, and that soon after the departure of said Milliken from Pecos city the plaintiff herein, by the letter of its president from its home office in Philadelphia, wrote Mrs. Mettler refusing to pay the policies, on the ground that plaintiff did not believe that her brother was dead; and while plaintiff did reiterate this as the reason why it should not be required to pay said policies in the court proceedings in said Mettler case,—yet, its conduct had been such as to cause this defendant to have no confidence in its good faith therein; and this defendant had no reason or cause whatsoever to doubt the good faith of Mrs. Mettler; and this defendant thought that plaintiff refused to pay said policies because it believed that the circumstantial evidence which Mrs. Mettler had to establish the death of her brother, the same as disclosed by said affidavits and proofs of death prepared by said Milliken, and the same as was introduced in evidence upon the trial of

said Mettler case,—was insufficient evidence to support a verdict in her favor, rather than it believed said Hunter had not been drowned and was not in fact dead. And this defendant says he did know that said fact was a material issue in said suit, tried, contested and decided in favor of said Jennie M. Mettler and against plain-
103 tiff herein, upon sufficient proof, circumstance and other facts; and that, by a verdict of the jury upon said issue and by the approval thereof and judgment thereon by this court in said cause, the fact that said W. A. Hunter was then dead, and was before the filing of said action at law,—was legally proven and established by competent evidence in the mode and manner recognized and provided by law; and the court having full jurisdiction, all further doubt, dispute, controversy and contention as to that fact and as to the liability of the plaintiff to pay to said Jennie M. Mettler the amount so found and adjudicated, were forever ended and solemnly adjudicated, and in all things finally affirmed by the Supreme Court of the United States; and thereafter by plaintiff herein recognized and observed; and knowingly and intentionally paying by its check, to the clerk of said court, for said Jennie M. Mettler, or her order, the amount so adjudged to be recovered by her, the validity and justness of said finding, verdict and judgment was no longer questioned, denied or disputed by plaintiff herein, nor open to such dispute; and was acquiesced in by plaintiff by its voluntarily, on, to-wit, June 3rd, 1902, before the return of the mandate from the Supreme Court of the United States to this court, on June 17th, 1902, and before execution issued or could have issued, on said judgment, paying off and satisfying said judgment, as aforesaid; and not until about one year after this defendant had received in the manner heretofore stated, relying upon the validity of said judgment, said $8,346.00, and had expended said money so collected by him in due course of business, did plaintiff intimate or assert that said W. A. Hunter was not in fact dead, or that said judgment or its payment was wrongfully or fraudulently obtained and not acquiesced in by it. This defendant says that said verdict of the jury and said judgment determining said issue cannot now be annulled or set aside, nor said issue of law or fact be again tried, retried or re-contested in this court, as plaintiff is attempting to do herein; and that plaintiff is now estopped from deny-
104 ing the validity of said judgment; and that its remedy, if any it has, is against those persons guilty of such fraud or wrong, if there be such persons, and not this defendant; and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant,—an innocent taker, in good faith, for value, in due course of his professional business, from the hand of said clerk, acting for said Jennie M. Mettler, without notice of any fraud or wrong done or intended toward plaintiff, or any equity in plaintiff herein, and after solemn adjudication of said controverted issues and facts.

X.

This defendant says that he is, and was, a stranger to and without knowledge of the supposed conspiracy and fraud between said Jennie M. Mettler and said W. A. Hunter,—and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; and this defendant says that, as to the written contracts between said Jennie M. Mettler and Alexander, Clark & Hall, Clark & Hall, and Alexander, Clark & Thompson and W. L. Hall, if it be held that said contracts are and were valid, existing contracts,—in this event, defendant says that both of said contracts have long since been performed; and that said attorneys at law, and each of them, in good faith and without intention, purpose or knowledge of any wrong or fraud toward plaintiff herein, in due course of their professional functions, became and were innocent purchasers for value of said interest in said policies or judgment, or money; and without intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if there was in fact such by said W. A. Hunter and Jennie M. Mettler, or either of them,—which is not admitted but denied; and without any knowledge that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony on the trial of said cause were false or fictitious. And this defendant says that the assignment of an interest in said
105 policies judgment and recovery, for and upon consideration of the contractual undertaking of said attorneys to render and perform in the future certain necessary legal services for the recovery and collection of said policies,—and which services so undertaken, said attorneys were bound to and did render in payment for said property interest, in good faith and without notice of any wrong intended or done plaintiff,—constituted such attorney or attorneys, and each of them innocent purchasers for value, in good faith, without notice of any equity of plaintiff; and created in this defendant an equity and title in and to the money so received by him, superior in all things to the pretended equity of the plaintiff; and this defendant in taking payment of his own demand from said Jennie M. Mettler, in the manner heretofore stated, took it free from any taint of wrong or equity of the plaintiff and by a right and title in all things superior thereto.

XI.

And this defendant denies all and all manner of unlawful combination and confederacy, or knowledge, implied or actual, thereof, wherewith he is by the said bill and amendment thereto charged, or that is sought to be established to his prejudice, without this—that there is no other matter, cause or thing in said plaintiff's said bill and amendment thereto contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or de-

nied, is true to the knowledge or belief of this defendant,—all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court may direct; and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

WILLIAM H. CLARK, Defendant.

McLAUREN & WOZENCRAFT,
Solicitors for Defendant, William H. Clark.

106 Indorsed as follows: No. 597. In equity. The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Mettler, *et al.* Original answer of defendant William H. Clark. Filed June 4th, 1904; J. H. Finks, clerk.

107 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, vs. JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The Answer of Charles A. Culberson, One of the Defendants, to the Bill of Complaint of The Fidelity Mutual Life Insurance Company, Plaintiff.

I.

This defendant, now and hereafter and at all times saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof, as this defendant is advised it is material or necessary for him to make answer to, answering, says:

II.

This defendant says that he is and was a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

108 III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters and things set forth in said bill of complaint occurring or existing prior to the 30th day of December, A. D. 1901, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting, combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this:

That this defendant, on to wit, December 30th, A. D. 1901, being a citizen of the State of Texas, was temporarily residing in the city of Washington, in the District of Columbia, and was then and there an attorney at law, duly licensed as such by the honorable, the Supreme Court of the United States. That upon the last named date, the said judgment in favor of Jennie M. Mettler as plaintiff and against the complainant herein, was then pending in the Supreme Court of the United States, and the said Jennie M. Mettler and the said William H. Clark, desiring the services of this defendant in the matter of the briefing and oral presentation of said case to the Supreme Court of the United States, did contract with this defendant, as follows, to-wit:

"In the Supreme Court of the United States.

FIDELITY MUTUAL LIFE ASS'N OF PHILADELPHIA
vs.
JENNIE M. METTLER.

Writ of Error from United States Circuit Court at Dallas.

This agreement witnesseth: Whereas, Jennie M. Mettler, as plaintiff, recovered judgment against the Fidelity Mutual Life Ass'n of Philadelphia in the above entitled cause, as fully appears from the record of the suit; and,

Whereas, a writ of error has been taken from the judgment of the court below, at Dallas, Texas, to the Supreme Court of the United States at Washington, by said company, and the cause is yet to be briefed and submitted in the Supreme Court for the said Mrs.
109 Mettler, as well as said insurance company;

Premises considered, we, the said Mrs. Jennie M. Mettler, a *femme sole*, and W. A. Clark, her attorney, the owners of said judgment, hereby employ Chas. A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the Supreme Court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to

him, said Chas. A. Culberson an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that the payment of said fee is contingent upon a recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of said Mrs. Jennie M. Mettler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said W. H. Clark therein, and that the one is not to be responsible for the portion to be paid by the other; that is each one undertakes to pay said Chas. A. Culberson five hundred dollars, as aforesaid.

Witness our hands, this 30th day of December, A. D. 1901, at Dallas, Texas.

MRS. JENNIE M. METTLER,
JENNIE M. METTLER,
By WM. H. CLARK, Her Attorney.
WM. H. CLARK.

HOMER, OHIO, LICKING CO., January 7th, 1902.

I do hereby certify that the above named Mrs. Jennie M. Mettler appeared before me and acknowledged the signing of this instrument to be her voluntary act and deed.

J. S. WILLIAMS, J. P."

110 That in pursuance of such contract, this defendant did prepare and assist in the preparation of the briefs filed in the said cause in the Supreme Court of the United States, and did present said cause to the Supreme Court of the United States on oral argument, and that the amount contracted to be paid this defendant by the said Jennie M. Mettler and the said William H. Clark was a reasonable, usual and customary charge. That on June 3, 1902, the clerk of this court drew his check No. 426 in favor of this defendant for $1026.00, said check being drawn on the American National Bank of Dallas. That said check was in payment of the aforesaid fee of $1000.00 earned by this defendant, and to reimburse him in the sum of $26.00 for necessary and proper disbursements made by him, and that this defendant endorsed said check to the National Exchange Bank of Dallas, which bank paid same on June 12, 1902, to this defendant by giving him credit therefor, and this defendant checked said money out of said National Exchange Bank of Dallas and used the same and is not now nor was he at the time of the filing of the original bill herein the owner of any of said money.

IV.

This defendant further avers that he was not present at, nor did he participate in, the trial of said cause in the court below; that he had no connection whatever therewith, until the record thereof was perfected and filed with the clerk of the Supreme Court of the United

States. That he had no knowledge, information, belief or suspicion that W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent upon lawful and just grounds, nor that any facts alleged or proven by or for said Jennie M. Mettler in said action at law, were false or fictitious, nor that any witness or testimony in her behalf was perjured, false or untrue; nor of any facts or circumstances reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor
111 other than produced at the trial of said cause, and then equally known to the plaintiff herein. That, upon the contrary, when said record was examined for the first time by this defendant, it appeared therefrom that the issue had been tried, submitted to a jury and that the jury had returned a verdict to the effect that W. A. Hunter was dead, that the trial court affirmed the verdict and entered a judgment in all things in accordance therewith, and that thereafter the trial court overruled the motion of complainant herein for a new trial therein, and thereby sanctioned in all things the correctness and justness of the verdict so rendered, and that the only connection this defendant had with said cause was to assist in the preparation of the brief upon and to orally present on behalf of the said Jennie M. Mettler to the Supreme Court of the United States the legal questions arising on the face of the record.

V.

This defendant further avers that the trial of the issue by the jury in the action at law mentioned in complainant's original bill of complaint cannot now be questioned, tried, re-tried, annulled, set aside, nor inquired into, in that the question of whether or not W. A. Hunter was dead was tried by a jury and such question cannot be tried in this proceeding, in that this proceeding is in opposition to the provisions of the 7th amendment to the Constitution of the United States, and all of this defendant is ready to verify.

VI.

And this defendant denies all and singular and all manner of unlawful combination and conspiracy wherewith he is by said bill charged or that is sought to be established to his prejudice, without this, that there is no other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true
112 to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and

humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

C. A. CULBERSON, Defendant.

F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for the Defendant, Charles A. Culberson.

Indorsed as follows: No. 597. In equity. The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Smythe, *et al.* Answer of defendant, Charles A. Culberson. Filed June 30th, 1904. J. H. Finks, clerk.

113 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *v.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity. No. 597.

The Plaintiff's Second Amendment to its Original Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the northern district of Texas:

Now, by its solicitor, comes the plaintiff in the above styled suit, and under leave of the court first had and obtained, amends its original bill of complaint as amended by its first amendment thereto, filed December 11, 1903, as follows, to-wit:

1.

It amends the third paragraph of the sixth section of said original bill, found on the ninth page thereof, by striking out from the eighth and ninth lines of said paragraph the words "and to the defendant, Charles A. Culberson, an interest of one thousand twenty-six dollars," and by adding to said paragraph at the close thereof, these words: "and the defendants Jennie M. Smythe and William H. Clark assigned and transferred to the defendant Charles A. Culberson an interest of one thousand twenty-six dollars in said judgment and cause of action and said fund therefrom arising." Said entire paragraph as so amended reads, as follows:

"In the meantime, the defendants, Morris A. Spoonts and
114 Charles A. Culberson, had been employed as associate attorneys under the provisions of said contract, and as such had

rendered professional services in said litigation. As compensation for the services by them severally rendered, the defendant, William H. Clark, assigned and transferred to the defendant, Morris A. Spoonts, an interest of one thousand five hundred dollars in his share of the money paid into court by the present plaintiff as aforesaid: and the defendants, Jennie M. Smythe and William H. Clark, assigned and transferred to the defendant, Charles A. Culberson, an interest of one thousand twenty-six dollars in said judgment and cause of action and said fund therefrom arising."

2.

It amends the fourth paragraph of section 7½ of said bill of complaint, the same being found on the fourth page of its said first amendment of its said bill of complaint, by striking out all of said paragraph after the first two sentences thereof, and inserting in lieu of the matter so stricken out these words: "Such payment was made to said Culberson by order of William H. Clark, and, as this plaintiff upon good grounds verily believes and alleges, partly our of his own share and partly out of the share of his co-defendant Jennie M. Smythe in said judgment and fund. The plaintiff is informed and it believes and so alleges, that such order was given chiefly in pursuance of a certain written assignment, which was executed under date of December 30, 1901, by the defendants Jennie M. Smythe and William H. Clark, whereby they assigned and transferred to the defendant Charles A. Culberson an interest of one thousand dollars in and to said judgment, and also the cause of action, that is, the policies of life insurance sued upon, as a contingent fee to the said Culberson for professional services to be rendered by him in their behalf in defending said judgment upon writ of error in the Supreme Court of the United States. The plaintiff is informed, and it believes and so alleges, that the remaining twenty-six dollars of the sum so ordered to be paid to him out of said fund, was
115 to reimburse him for a like amount theretofore expended by him in the printing of a brief for the defendant in error in said cause pending in the Supreme Court. The plaintiff upon good grounds believes, and it so alleges, that when said order was given and accepted, and when said written assignment was given and accepted, said Culberson had made a careful examination of the record in said cause pending in the Supreme Court, and knew its contents; and that he knew that by its pleadings therein contained this plaintiff had denied that William A. Hunter was dead as alleged; and that he knew that one of the errors assigned by this plaintiff in the Supreme Court was the refusal of the trial judge to charge the jury peremptorily in its favor, upon the ground that there was no evidence that said Hunter was dead, and that the evidence established the fact that he was not dead. And so when he accepted said assignment and order and check, said Culberson had actual notice of this plaintiff's rights and defenses." Said entire paragraph as amended reads as follows:

"The sum of one thousand twenty-six dollars received by Charles A. Culberson as set forth in section 6 of this bill was paid to said Culberson by the clerk of the court by means of his check No. 426 for one thousand twenty-six dollars, drawn June 3, 1902, on the American National Bank of Dallas, with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia. Said Culberson transferred said check by endorsement to the National Exchange Bank of Dallas; to which bank the same was paid June 12, 1902, through the Dallas clearing house, by the American National Bank of Dallas. Such payment was made to said Culberson by order of William H. Clark, and, as this plaintiff upon good grounds verily believes and alleges, partly out of his own share and partly out of the share of his co-defendant Jennie M. Smythe in said judgment and
116 fund. The plaintiff is informed, and it believes and so alleges, that such order was given chiefly in pursuance of a certain written assignment which was executed under date of December 30, 1901, by the defendants Jennie M. Smythe and William H. Clark, whereby they assigned and transferred to the defendant Charles A. Culberson an interest of one thousand dollars in and to said judgment, and also, the cause of action, that is, the policies of life insurance sued upon, as a contingent fee to the said Culberson for professional services to be rendered by him in their behalf in defending said judgment upon writ of error in the Supreme Court of the United States. The plaintiff is informed, and it believes and so alleges, that the remaining twenty-six dollars of the sum so ordered to be paid to him out of said fund, was to reimburse him for a like amount theretofore expended by him in the printing of a brief for the defendant in error in said cause pending in the Supreme Court. The plaintiff upon good grounds believes and it so alleges, that when said order was given and accepted, and when said written assignment was given and accepted, said Culberson had made a careful examination of the record in said cause pending in the Supreme Court, and knew its contents; and that he knew that by its pleadings therein contained this plaintiff had denied that William A. Hunter was dead as alleged; and that he knew that one of the errors assigned by this plaintiff in the Supreme Court was the refusal of the trial judge to charge the jury peremptorily in its favor, upon the ground that there was no evidence that said Hunter was dead, and that the evidence established the fact that he was not dead. And so when he accepted said assignment and order and check, said Culberson had actual notice of this plaintiff's rights and defenses."

Wherefore the plaintiff prays that this its amendment be annexed to, and read with, its original bill of complaint as a part thereof.

MAURICE E. LOCKE,
Solicitor and Counsel for Plaintiff.

117 THE STATE OF TEXAS, }
County of Dallas. }

Andrew J. Brown, being first duly sworn, makes oath and says: I am general agent for Texas of The Fidelity Mutual Life Insurance Company, the plaintiff in the above styled suit. The allegations contained in the plaintiff's foregoing amendment of its original bill of complaint are true, except such as are made upon information and belief, and them I believe to be true.

A. J. BROWN.

Sworn to and subscribed by Andrew J. Brown before me this 4th day of July, A. D. 1904.

[SEAL.]

B. T. SEAY,
Notary Public, Dallas County, Texas.

Indorsed as follows: # 597. Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's second amendment of its bill of complaint. Filed 4 day of July, 1904 at 10⅝2 o'clock a. m. J. H. Finks clerk, by C. B. Hollarn, deputy. Maurice E. Locke, attorney and counselor, Dallas, Texas.

118 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, *v.* JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The Replication of the Plaintiff to the Answer of the Defendants Jennie M. Smythe and James N. Smythe.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true: all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Indorsed as follows: #597 Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's replication to the answer of Jennie M. and James N. Smythe. Filed 4 day of July, 1904, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

119 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *v.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The Replication of the Plaintiff to the Answer of the Defendant William H. Clark.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Indorsed as follows: #597, equity. The Fidelity Mutual Life Insurance Company, *v.* Jennie M. Smythe, *et al.* Plaintiff's replication to the answer of William H. Clark. Filed 4 day of July, at — o'clock — m. 1904; J. H. Finks, clerk, by C. B. Hollarn, deputy.

120 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

The Replication of the Plaintiff to the Answer of the Defendant Morris A. Spoonts.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Indorsed as follows: #597, equity. The Fidelity Mutual Life Insurance Company, *v.* Jennie M. Smyth, *et al.* Plaintiff's replication to the answer of Morris A. Spoonts. Filed 4 day of July, 1904, at — o'clock — m.; J. H. Finks, clerk, by C. B. Hollarn, deputy.

121 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

The Replication of the Plaintiff to the Answer of the Defendant Charles A. Culberson.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said an-

swer, for replication thereunto saith that it will aver and prove its bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Endorsed as follows: # 597. Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's replication to the answer of Charles A. Culberson. Filed 4 day of July, 1904, at 10:55 o'clock a. m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

122 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *v.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The Replication of the Plaintiff to the Answer of the Defendant Phillips Investment Company.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto saith that it will aver and prove its bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Indorsed as follows: # 597, equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's replication to the answer of Phillips Investment Company. Filed 4 day of July, 1904, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

123 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Complainant,
vs.
JENNIE M. SMYTHE ET AL., Defendants.
} No. 597. In Equity.

Amended Answer of the Defendants Jas. N. Smythe and Jennie M. Smythe.

Now come the defendants, Jas. N. Smythe and Jennie M. Smythe, defendants to the bill of complaint of The Fidelity Mutual Life Insurance Company, complainant and by leave of the court, file this their supplemental answer, and say:

These defendants, now and at all times, saving and reserving unto themselves, and in no wise waiving all benefit and advantage of their plea of personal privilege to be sued in the district whereof they, and each of them, are residents, and saving and reserving all benefit and advantage of exception and demurrer, which can or may be had or taken to the errors or uncertainties, or other imperfections, in said bill of complaint contained, and for answer thereto, or so much of said parts thereof as said defendants are advised is or are material for them to answer unto, say as follows:

1. It is true that in the latter part of October, 1896, that Wm. A. Hunter insured his life for the benefit of his sister, the defendant Jennie M. Smythe; that at said date to-wit October 1896, the said Jennie M. Smith was a widow and was then Jennie M. Mettler. Said insurance upon the life of said Wm. A. Hunter, who was then and there the brother of the said Jennie M. Smyth, née Jennie M. Mettler, amounted in the aggregate, to the sum of fifteen thousand ($15,000.00) dollars, being three policies each for the sum of $5000, and issued by the Fidelity Mutual Life Association of Philadelphia. These defendants admit that on or about the 26th day of March 1903, the defendant, Jennie M. Smythe, being then Jennie M. Mettler, and the beneficiary in said policies of insurance, was married to the defendant, Jas. N. Smythe, and that the said Jennie M.
124 had been continuously a widow, and was named Jennie M. Mettler from the date of the issuance of said policies of insurance up to the date of her marriage with the said defendant, Jas. N. Smythe.

2. These defendants admit that when said policies were issued

to-wit, in October 1896, that Andrew J. Brown, was the State agent for the Fidelity Mutual Life Association of Philadelphia, for the State of Texas and that said association was duly authorized to transact business in said State. They further admit that the said agent Andrew J. Brown, and the said Wm. A. Hunter, who procured said policies of insurance to be issued upon his life for the benefit of his sister, the said Jennie M. Smythe, née Jennie M. Mettler, were intimate acquaintances and friends at Alvarado, Texas, for a period of several years; the said Brown being a merchant and the latter a book-keeper in that town at said time. That said Andrew J. Brown solicited said insurance and wrote out the application for same, as these defendants are informed and believe; and they deny that said insurance was obtained by any false or fraudulent statement made by the said Wm. A. Hunter in order to procure the same, but while they have no personal knowledge of the statements made, they verily believe that the statements so made by the said Wm. A. Hunter, in his application for such policies of insurance were true.

3. These defendants admit that the complainant in this suit, to-wit, The Fidelity Mutual Life Insurance Company was formerly the Fidelity Mutual Life Association of Philadelphia, and that by an amendment of the charter of said association, its name was changed to the Fidelity Mutual Life Insurance Company, without in any wise losing its identity, and that ever since a date anterior to 1896 the said original Fidelity Life Association, and the Mutual Benefit Life Association, its successor, have been doing business in the State of Texas, under the authority of the State.

4. These defendants admit that in October 1896, Wm. A. Hunter who was then a brother of the defendant, Jennie M. Smythe, who was then Jennie M. Mettler, and residing with her in Reeves county, Texas, procured the insurance as above stated, but they are not advised as to whether or not the said Wm. A. Hunter visited
125 the Texas office of the complainant in the city of Dallas and there renewed an old acquaintance with the complainant's general manager, Andrew J. Brown. They are not advised as to what statements, if any, the said Wm. A. Hunter made when he procured said insurance, or when same was issued; having no personal knowledge of the facts in reference thereto, these defendants leave the complainant to make such proof in reference thereto as can be made; but these defendants deny that any statement was made for any fraudulent purpose on the part of the said Wm. A. Hunter, and they deny that they, or either of them, were ever advised of any such statements, until long after the institution of a suit by Jennie M. Mettler in the district court of Dallas county, Texas against the said Fidelity Mutual Life Association to recover the amount of said policies which said suit was filed on December 2nd, 1897.

5. These defendants admit that, on, to-wit, about December 3rd 1896, that the said Wm. A. Hunter left the town of Pecos,

Texas, for the purpose of taking a trip of a week or ten days to a place in Loving county, Texas, about forty miles north of Pecos. He took with him two horses, camping utensils and provisions for himself and team. These defendants are not advised as to the route pursued by the said W. A. Hunter after leaving Pecos, but believe that he crossed the Pecos river near the town of Pecos and traveled for a distance of fourteen or fifteen miles along the public highway leading towards Loving county, and that he left said highway and drove, off toward the Pecos river, where he made a camp and arranged his bed, camp fire, camping utensils and food. They admit he removed the harness from the horses and left it lying on the ground near the wagon. That afterwards said wagon and camp were found, and that one of the horses was found tied to a tree, where it had apparently starved to death. These defendants say that the said Mrs. Jennie M. Mettler, now Jennie M. Smythe visited the camp on the Pecos river, and saw what she verily believed, and does now believe, to be the tracks of the said Wm. A. Hunter, leading down from the wagon to the edge or bank of the river, and that she saw no tracks returning from said river. These de-
125½ fendants aver that they have no idea when the said Wm. A. Hunter left said camp, or the circumstances under which he left, or the reason which influenced him to leave the camp, if in fact he did leave the same, which these defendants do not deny.

These defendants admit that the other horse was found sometime afterwards near the town of Barstow, a station on the Texas & Pacific railway; that he was running on the commons near the town; that a loose rope dangled from his neck; but how the said horse came to be there these defendants are not advised, and have no information or belief, and they leave the complainant to make such proof in reference thereto as it can make.

These defendants have no knowledge of where said Wm. A. Hunter went after leaving the camp; they have no knowledge of the fact that he quitted the State of Texas and assumed a fic-itious name, and ever thereafter concealed himself, so that he should not be found by the plaintiff. These defendants deny that the said Wm. A. Hunter ever did attempt to conceal his person from the plaintiffs. They aver that they, nor either one of them, have seen the said Wm. A. Hunter since he left the town of Pecos about the morning of December 3rd 1896, but they say that they have been advised that the said Wm. A. Hunter, did leave the State of Texas, and that he was arrested in Birmingham, Alabama, about the 27th day of April 1903, and that at the time of his arrest he was known as W. A. Hunt. They aver that the said W. A. Hunt, if indeed he be identical with W. A. Hunter, resided in and around Birmingham, Alabama, lived openly and was engaged in active business that brought him in communication with a great many people; that he occupied important positions of trust, being upon more than one occasion the judge of elections. If it be a fact that the said W. A. Hunter changed his name and assumed the name of W. A.

Hunt, these defendants say that the same was done without their knowledge, procurement, or consent, and that they never heard of such a thing, or suspected anything of the kind, until after April 27th, 1903, when there appeared in the newspapers, printed in Newark Ohio, the home of these defendants, an account of the
126 arrest of W. A. Hunt, and that he was identical with W. A. Hunter.

6. These defendants, and each of them, deny that there was ever any understanding, contract or agreement or statement made by the one to the other, that the said Wm. A. Hunter should procure insurance upon his life for the benefit of his sister, Jennie M. Mettler, now Jennie M. Smythe, and these defendants say that the said Jennie M. Mettler did not know of the existence of any policies of insurance upon the life of said Wm. A. Hunter until the latter part of the year 1896, or the first part of 1897. She avers that about the latter part of December 1896, she was informed by parties sent to search for her brother, the said Wm. A. Hunter, that his camp had been found on the Pecos river, and describing the condition of the camp as hereinbefore set out. That she visited in connection with many others, the said camp, and that she verily believed that her brother had been drowned in the Pecos river about the 2nd or 3rd of December 1896; that in the latter part of December 1896, or the 1st of January 1897, she went to the office of R. D. Gage, a lawyer and banker at Pecos, Texas, to get his advice in reference to the collection of a promissory note for a small amount due and payable to her said brother, Wm. A. Hunter, which she had found in his trunk, and Mr. Gage then told her that her brother had left a package of papers in the vault of his bank, and got the papers, which were in a sealed envelope the contents being unknown to both Mr. Gage and said defendants, and the package was there opened, and it contained said policies of insurance. These defendants say that before the opening of said package she had no idea that any policies of insurance had been issued upon the life of W. A. Hunter for the benefit of Jennie M. Mettler or any one else, and that the first knowledge and information which she ever had in reference to said policies of insurance were when the same were found by herself and Mr. Gage in the package as above stated.

7. When said policies of insurance were discovered, as aforesaid, upon the advice of Mr. Gage, notice in writing was given
127 to *to* the Mutual Life Association of the death of the said Wm. A. Hunter, and soon thereafter one R. C. Milliken, who was then and there the agent for the said association, came to Pecos city, Texas, and was given full information of the facts in reference to the finding of the camp of the said Wm. A. Hunter and of his life and family. That while in Pecos city said R. C. Milliken, who was the adjuster for said association caused to be sent to him from one of the offices of the association, either at El Paso or Dallas, Texas, a telegram stating, in substance that said company had had Wm. A. Hunter arrested, and that the officer was then on

the way to Pecos city with him. That upon receiving said telegram at Pecos city said adjuster called at the home of the defendant Mrs. Smythe, who was then a widow, Mrs. Jennie M. Mettler, and showed her said telegram, and threatened her and her brother with the penitentiary if she did not deliver up the said policies, cancelled at once, and promised her that if she would do so, that he, the said adjuster, would see that neither herself nor her brother were ever prosecuted. That she ordered him from the house, believing that the telegram was false, and such telegram was false, and known to be so by the said Milliken at the time he presented it to the said defendant, Jennie M. Smythe, nee Jennie M. Mettler.

8. These defendants say that sometime after the 1st day of January 1897, proofs of loss, or proofs of the death of said Wm. A. Hunter, as required by the terms of said policy, were made out and prepared, by the hand of the said agent, R. C. Milliken, and that he procured from the said defendant, Mrs. Jennie M. Smythe, then Jennie M. Mettler an affidavit to the same, and forwarded same to the home office of the company at Philadelphia, Pennsylvania. She is informed, and believes, and therefore charges the fact to be that said proofs of loss were received at the home office of said association, but she avers that notwithstanding they were furnished as required, the said company refused to pay said policies.

9. These defendants show that said policies of insurance, being unpaid, the defendant Jennie M. Mettler, on to-wit, the 2nd
128 day of December 1897, instituted a suit in the district court of Dallas county to recover the amount of said policies. In said suit the said Jennie M. Mettler was plaintiff and The Fidelity Mutual Life Association of Philadelphia was the defendant, and the suit was to recover the amount of the policies, set out and described in the complainant's bill in this cause. Citation was regularly issued in said cause and served upon said association, by delivering the proper process to A. J. Brown, its agent in the county of Dallas; and that thereafter, on to-wit the 4th day of January 1898, the said association filed its application and bond in due form of law, for the removal of said cause from the district court of Dallas county into the circuit court of the United States for the northern district of Texas, at Dallas. Said petition was granted by the judge of the district court of Dallas county, and a transcript of the record of the proceedings in said district court were filed in the United States circuit court for the northern district of Texas, at Dallas, on January 8th, 1898 on the law side of the docket, same being an action at law.

10. These defendants aver that on, to-wit; November 11th, 1899 in said cause then pending in the United States circuit court for the northern district of Texas at Dallas, to-wit Mrs. Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia, the plaintiff therein, Mrs. Jennie M. Mettler, now the defendant Mrs. Jennie M. Smythe filed her first amended original petition seeking to recover the amount of said insurance policies, together with damages and reasonable attorneys' fees, as provided for by the statutes of the

State of Texas. That said first amended original petition is attached to and made a part of the complainant's bill herein, and marked Exhibit A; and all of the averments contained in said amended original petition, especially the averment alleging the death of the said W. A. Hunter, are adopted as a part of this answer. Defendant shows that in answer to said suit then pending in the United States circuit court for the northern district of Texas, the defendant therein, The Mutual Life Association, filed various exceptions and objections to the sufficiency of the plaintiff's petition; and
129 further, that the said defendant in said cause so pending, filed the following to-wit:

"3rd. The defendant denies each and singular the allegations in plaintiff's petition contained, and demands strict proof thereof, and of this it puts itself upon the country."

That according to the practice, pleading and modes of procedure prescribed by the laws of the State of Texas, this pleading denies each and every allegation in plaintiff's petition contained, and puts the plaintiff upon proof of the same. That the said defendant association filed other and special pleas in said cause, amongst others setting up substantially the same false and fraudulent representations made in the procurement of the policies by the said Wm. A. Hunter, as are alleged in the present bill of complaint filed in this cause.

11. These defendants show that at a regular term of the United States circuit court for the northern district of Texas, at Dallas held on, to-wit, the 28th day of May, 1900, said cause came on to be tried and the plaintiff in said cause, to-wit Jennie M. Mettler, made her written application for a continuance of said cause, until the next succeeding term of the court, that said application was resisted by the defendant in said cause, to wit; the Mutual Benefit Life Association, and said application was by the said court overruled, and thereupon both parties announced ready for trial. Upon the hearing of said cause the defendant admitted in open court that all matters of proof relating to the death of the insured, Wm. A. Hunter, and all formal proofs, were sufficient, and that the only question to be tried and involved was as to whether or not Wm. A. Hunter was dead, as claimed in plaintiff's petition, and whether he died in the manner and form as alleged therein.

A jury was impanelled and the plaintiff in said cause offered testimony tending to support the issue on her side, and the de-
130 fendant offered testimony tending to prove that the said Wm. A. Hunter was not dead, and had not come to his death in the manner and form as alleged in plaintiff's petition; and the defendant in said cause introduced the testimony of two witnesses, each testifying to the fact that they had seen the said Wm. A. Hunter alive a long time after he was alleged to have been drowned in the Pecos river. After the testimony had closed the court instructed the jury, in writing, amongst other things, as follows to-wit; "It is the theory of the defendant that Wm. A. Hunter did not come to his

death at the time and in the manner contended by plaintiff. Evidence of circumstances relating to his disappearance, and of the condition of things found at his camp on the bank of the Pecos river, have been introduced before you, in support of the theory of the defendant.

The evidence of witnesses is also before you, tending to show that Wm. A. Hunter has been seen on two occasions, and at two places since the date of his alleged disappearance on December 4th, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then of course it would be your duty to find for the defendant."

The court also instructed the jury: "You should carefully consider and weigh all of the facts and circumstances which have been detailed before you in relation to the finding of his wagon and outfit, and the conditions at the camp in connection with the other evidence in the case, in reaching your conclusion as to whether or not Hunter met his death at the time and in the manner alleged by plaintiff. If you come to the conclusion that Hunter met his death at or about the time alleged in plaintiff's petition as the date of his death and the manner therein named, to-wit, by being drowned in the Pecos river, it would be your duty to find for the plaintiff."

12. After hearing the evidence in said cause, and the charge of the court, the jury retired and returned a verdict in favor of the plaintiff in said suit; and upon said verdict judgment was
131 rendered in favor of the plaintiff, upon which said verdict, after a remittitur of $3375, judgment was rendered by the court in favor of the plaintiff in said suit, Jennie M. Smythe, then Jennie M. Mettler and against the said Fidelity Life Association, for the sum of $21,550.00 together with six per cent. interest thereon, and all costs.

13. In due time, and according to the rules of said court, the said defendant in said action, to-wit, The Mutual Benefit Life Association filed its motion for a new trial on June 4th, 1900 and its amended motion for a new trial on June 25th, 1900. In said amended motion as one of the grounds for a new trial, the said association says; "12: The verdict is contrary to the law and is wholly unsupported by the testimony in that there is no evidence established or tending to establish, in any legitimate manner, the death of the assured. The utmost that can be said, from the testimony, is that it has established a case of disappearance solely and only, because the overwhelming and preponderating facts, that are unimpeached and unimpeachable in the records, have established that the assured did not meet his death by drowning as alleged." This motion for a new trial was overruled, to which the defendant in said cause duly excepted and prosecuted a writ of error to the Supreme Court of the United States, which said Supreme Court, on May 5th, 1902, in all things affirmed

the rulings and judgment of the circuit court of the United States for the northern district of Texas, at Dallas.

The mandate of the Supreme Court was received and filed in the United States circuit court for the northern district of Texas, at Dallas, on June 17th 1902.

14. These defendants say that on June 3rd 1902, before said mandate of the Supreme Court of the United States had been returned and filed in the United States circuit court for the northern district of Texas, and before said judgment could be enforced by any legal process issuing out of said circuit court, the complainant herein The Fidelity Mutual Life Insurance Company, voluntarily paid
132 to J. H. Finks, the clerk of the said circuit court, for Jennie M. Mettler, in satisfaction of her said judgment principal and interest the sum of $24,028.25.

15. These defendants admit that on June 3rd 1902 the said J. H. Finks, clerk as aforesaid, drew his check on the American National Bank of Dallas, in favor of W. H. Clark attorney for Jennie M. Mettler, for the sum of $11,616.00 which was the full amount to which the defendant, Jennie M. Mettler was entitled, under her contract with her said attorney; and that a few days thereafter her said attorney remitted to her, at her then home in Homer, Ohio, said sum in New York exchange.

16. These defendants have no personal knowledge of the amounts paid by W. H. Clark, attorney for the defendant, Jennie M. Smythe, née Jennie M. Mettler, but they do not deny that the sum of $8346.00 was paid to W. H. Clark, and that the sum of $1500.00 was paid to Morris A. Spoo-ts, and $1026.00 to Charles A. Culberson. These defendants are advised and believe that the amounts so paid to the said M. A. Spoonts and the said C. A. Culberson were for attorneys' fees for assisting the said Wm. H. Clark in the prosecution of the suit of Jennie M. Mettler against the Mutual Benefit Life Association in the United States circuit court at Dallas, and in the Supreme Court of the United States.

The defendant admits that the sum of $1540.25 was paid to the Phillips Investment Company by some agreement entered into between W. H. Clark and said investment company, with which these defendants have no concern; that all of said money so paid to W. H. Clark, Morris A. Spoonts, C. A. Culberson, the Phillips Investment Company, and to the defendant Jennie M. Mettler, was paid in checks drawn by J. H. Finks, the clerk of the United States circuit court for the northern district of Texas at Dallas on the American Nat. Bank of Dallas, and countersigned by the Honorable Edward R. Meek, judge of the said court, the said American national bank at Dallas being the depository for said court.

17. These defendants deny that the said Wm. A. Hunter ever received any part or parcel of said money; that there was ever any understanding or agreement between the said Wm. A. Hunter and the said Jennie M. Mettler, now Jennie M. Smythe; that the
133 said Wm. A. Hunter should have his life insured for her benefit; that she never knew, as heretofore stated; that there

was any insurance of any character or kind upon the life of Wm. A. Hunter until the policies referred to were delivered to her by Mr. Gage as hereinbefore stated.

18. These defendants aver that they never saw the said Wm. A. Hunter after he left the town of Pecos on or about December 2nd, 1896, that they had no communication with him of any character or kind, and never knew his whereabouts; and if it be a fact that the said Wm. A. Hunter changed his name and assumed that of Wm. A. Hunt, these defendants aver that the same was done without their knowledge procurement or consent.

19. These defendants repeat that the first intimation that they, or either one of them had that Wm. A. Hunter was alive, after the 2nd or 3rd day of December, 1896, was when the fact was published in the local newspaper at her home in Newark, Ohio, that one W. A. Hunt had been arrested at Birmingham, Alabama; that he was in fact not W. A. Hunt, but W. A. Hunter, and the same person who had procured the policies of insurance upon his life hereinbefore referred to.

20. And these defendants deny, all and singular the unlawful combination, the conspiracies, or knowledge, implied or actual thereof, wherewith they, or either of them, is by said bill and amendment thereto charged, or that is sought to be established against them; and these defendants say that all matters set up in this answer, which are alleged to be true, are true in fact, and each and every one of the allegations in this answer contained these defendants are ready and willing, and here offer to maintain and prove, and they humbly pray to be hence dismissed, with their reasonable charges and costs in this behalf sustained.

W. H. CLARK,
CRAWFORD & CRAWFORD,
Solicitors for Def'ts Jennie M. & James N. Smythe.

Endorsed as follows: No. 597 Equity. The Fidelity Mutual Life Insurance Co. *vs.* Jennie M. Smythe *et als.* Supplemental answer of Jennie M. Smythe & James N. Smythe. Filed Jan. 30, 1905. J. H. Finks, clerk.

134 THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

Final Decree.

The above styled cause coming on to be heard at this, the January term of 1903, came all parties plaintiff and defendant by their

respective solicitors and counsel, and announced ready for trial. Thereupon, having heard the pleadings, proofs, and argument of counsel, the court took the cause under advisement.

Now, on this, Saturday, February 25, 1905, the court doth order and decree as follows: (1) That the defendants Jennie M. Smythe and James N. Smythe be restrained by the injunction of this court from in any way making use of the judgment rendered July 4, 1900, in the aforesaid action at law entitled Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia, and numbered 2118 upon the law docket of this court, and especially from ever setting up said judgment by answer, plea or demurrer as an adjudication that said William A. Hunter died in December, 1896, or as an adjudication that the plaintiff ever was indebted to them or either of them upon account of the three policies of life insurance sued upon in said action at law, or as tending in any way to justify them or either of them in receiving and converting to their own use the plaintiff's money paid to the said Jennie M. Smythe, formerly Jennie M. Mettler, on account of said judgment. (2) That the defendant, Jennie M. Smythe, do repay to the plaintiff, The Fidelity Mutual Life Insurance Company, and that said plaintiff do
135 have and recover from the said defendant, the sum of eleven thousand six hundred sixteen dollars of the plaintiff's money had and received by the said defendant Jennie M. Smythe on to-wit June 3, 1902, together with the further sum of one thousand nine hundred one and 15/100 dollars as interest on the sum so had and received, at the rate of six per centum per annum from June 3, 1902, to February 25, 1905, making in all the gross sum of thirteen thousand five hundred seventeen and 15/100 dollars, together with interest on said gross sum at the rate of six per centum per annum from and after February 25, 1905. (3) That the plaintiff do have and recover from the said defendant Jennie M. Smythe and James N. Smythe all its costs in this behalf incurred. (4) That the plaintiff take nothing by its suit against the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, and that as to said defendants its bill of complaint be dismissed. (5) That the clerk issue all process usual and appropriate for the enforcement of this decree.

EDWARD R. MEEK,
U. S. District Judge.

Indorsed as follows: # 597 Eq. The Fidelity Mutual Life Ins. Co. *vs.* Jennie M. Smythe, *et al.* Decree. Filed 25 day of Feb'y, 1905, at — o'clock — m. J. H. Finks, clerk. By —— —— deputy.

136 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, *v.* JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

Record of Evidence Introduced and of Rulings on Evidence.

Be it remembered, that at the trial of the above styled cause, evidence was introduced, and rulings upon questions of evidence were made by the court, as follows:

The plaintiff introduced the following:

1. Deposition of H. B. Taylor.
2. Deposition of John H. Stuart.

On objection by the defendants, the court excluded the following statement: "My understanding is he was playing the races down at the Coney island for about a year."

The defendants objected to the introduction of testimony given by the witness to the same effect as testimony given by him on the trial of Mettler *v.* Fidelity Mutual Life Association, and shown in the bill of exceptions in that case. The court overruled the objection.

3. Deposition of John Swartz.
4. Deposition of Andrew J. Brown.
5. The three original insurance policies sued upon in Mettler *v.* Fidelity Mutual Life Association.

137 6. Deposition of Harrie H. Fouse.

7. Deposition of Evalene A. Kellgore.
8. The copy of Hunter's application for insurance attached to policy No. D73374.
9. Deposition of C. R. Buddy.
10. Act of Texas legislature dissolving Loving county.
11. Certified copies from State treasury of Hunter's two land accounts with the State.
12. Deposition of W. B. Oates.
13. Deposition of Mrs. M. H. Manning.
14. The copies of the pleadings in Mettler *v.* Fidelity Mutual Life Association attached as exhibits to the plaintiff's bill of complaint, it being agreed in open court that the same were true copies and might be regarded as evidence of the contents of said pleadings.
15. Deposition of J. W. Prewit.
16. Deposition of Mrs. J. B. Miller.
17. Deposition of R. D. Gage.

18. Deposition of James B. Gibson.
19. Deposition of R. S. Johnson.

The following portion of this deposition was excluded by the court on objection by the defendants, the plaintiff having offered it solely for the purpose of corroborating Mrs. Johnson's testimony that Mrs. Mettler had told her in the fall of 1896 that Hunter's life was insured: "Q. Please state whether before your trip to Hunter's camp on the 29th of December, you had any information, by hearsay or otherwise, of the fact that Hunter's life was insured in favor of his sister, Mrs. Mettler. A. Yes, I did. Q. When and how did you receive that information? A. I received it from my wife. Q. When was it you received this information? A. I think it must have been about the 10th of November. Q. It was before
138 Hunter returned to this part of the country? A. Yes. My wife told me that Mrs. Mettler was looking for Hunter to come out here and go up and live on his land;—the plan was for him to go up and prepare a house for her and then he was to come back and take her up there. And before he got here she had this conversation, and the plan was made, so Mrs. Mettler said; and during that conversation she told my wife he had his life insured in her favor, and my wife told me about it. Q. So you knew from that source at the time you went to Hunter's camp on the 29th, that Hunter's life was insured in favor of his sister? A. Yes, sir, I did."

20. Deposition of Mrs. R. S. Johnson.
21. Deposition of George E. Sapp.
22. Letter from Mrs. Mettler to Fidelity Mutual Life Association, dated January 2, 1897.
23. Deposition of J. A. White.

On objection of the defendants, and with the consent of the plaintiff, the court excluded the testimony of the witness concerning his conversation with Mr. Slack.

24. Deposition of A. D. Irvin
25. Deposition of Lula Irvin.
26. Deposition of Patrick Carson.
27. The original proofs of Hunter's death sent by Mrs. Mettler to Fidelity Mutual Life Association.
28. The questions and answers numbered as per list below given, contained in Mrs. Mettler's supplementary affidavit No. 3 which she sent to Fidelity Mutual Life Association with her proofs of death, the same being received February 23, 1897: Nos. 1, 5, 7, 8, 9, 14, 15, 18, 19, 21, 23, 30, 31.
29. Deposition of Nettie Meyer.
30. Deposition of D. C. Wallace.
31. Deposition of Andrew J. Pierson.
139 32. Deposition of Charles H. Spencer.
33. Deposition of W. F. Davis and exhibit.
34. Deposition of Joseph R. Tate.
35. Certified copies of papers in Hunt *v.* Newsom.
36. Deposition of J. S. Cambron.

37. Deposition of R. C. Milliken.
38. Certified copy of Hunter's *habeas corpus* proceedings.
39. Deposition of F. P. Housholder.
40. Deposition of Luella M. Butcher.
41. Judgment and mandate in Mettler *v.* Fidelity Mutual Life Association.
42. Deposition of William A. Hunter, Sr.
43. Deposition of Mrs. Minnie Hous-holder.
44. Deposition of Clara B. Hunter.
45. Deposition of Birdie J. Yoakam.
46. Deposition of Dr. F. J. Hunter.

The court stated that the excerpts from the letters written by the witness to J. B. Gibson were not considered as evidence, and that their reading was permitted only to throw light on the testimony of the witness. The plaintiff's counsel stated that these excerpts were not offered as evidence.

47. Deposition of Joseph E. Gilbert.
48. Original bill of exceptions in Mettler *v.* Fidelity Mutual Life Association.
49. Deposition of Oliver C. Bosbyshell.
50. Deposition of L. G. Fouse.

On objection of the defendants the court excluded that portion of this deposition in which the witness testified as to the reason why the plaintiff never believed that Hunter was dead, to-wit: "Because the physical conditions after such an accident were highly improbable, and the fact that the one horse was tied to a bush close to the wagon, that the other horse was found at some distance near a railroad station and passed through three gates, that according to the investigation had been closed, and that the hand-bag disappeared and overcoat disappeared, which he was not liable to have on
140 his person, taking into account the climate and conditions of the weather, that instead of its being a case of accident, was a case of disappearance." The plaintiff did not object to the exclusion of this testimony.

51. Deposition of J. H. Finks with all exhibits.
52. Deposition of L. A. Smith, with all exhibits.
53. Original check of the plaintiff for $24026.25 in favor of the clerk.
54. The several checks issued by the clerk and receipts taken by him in disbursing the proceeds of the judgment in Mettler *v.* Fidelity Mutual Life Association, using without objection the copies thereof attached as exhibits to the deposition of J. H. Finks and L. A. Smith.
55. Deposition of A. J. Wilson.
56. Deposition of Harry P. Kutz.
57. Deposition of Anthony R. Pitser.
58. Letter from Jennie M. Mettler to W. H. Clark, dated May 12, 1902, using without objection the copy attached to the deposition of J. H. Finks.
59. Deposition of M. L. Crawford.

On an objection of the plaintiff, admitted by the defendants to be well taken, the court excluded the following testimony contained in the cross-examination of the witness: "Amongst other papers furnished me by W. A. Hunt, alias W. A. Hunter, was a bank book in a private savings bank at Birmingham, Alabama. This book was delivered to Mr. Hunter after his discharge from custody. It showed a gradual accumulation of funds in small amounts covering a period of four or five years. Q. What was the total amount. A. It was less than three thousand dollars."

60. The cross-examination of Jennie M. Smythe.

61. The various assignments, letters, and notes of which
141 copies are attached as exhibits to the deposition of J. H. Finks, using said copies without objection.

62. Deposition of William H. Clark, taken by the defendants.

63. Deposition of Morris A. Spoonts, taken by the defendants.

64. Deposition of W. M. Alexander, taken by the defendants.

65. Deposition of W. L. Hall, taken by the defendants.

The defendants introduced the following:

1. Direct examination in deposition of Jennie M. Smythe.

2. The defendant's motion for a new trial in Mettler *v.* Fidelity Mutual Life Association.

3. The charge of the court in Mettler *v.* Fidelity Mutual Life Association.

4. The stipulations as to issues to be tried, made on the trial of Mettler *v.* Fidelity Mutual Life Association.

5. The defendant's assignment of error in Mettler *v.* Fidelity Mutual Life Association, to the effect that there was no evidence that Hunter was dead.

6. The date of filing of the mandate in Mettler *v.* Fidelity Mutual Life Association.

7. It was admitted that the witnesses who testified in Mettler *v.* Fidelity Mutual Life Association are the same persons as the witnesses of like name who have testified in this case.

8. It was agreed that the opinion of the court of criminal appeals in the case of Hunter alias Hunt *v.* The State, as reported at page 730 of volume 81 of the Southwestern Reporter should be considered in evidence without being read.

At the request of the plaintiff, the foregoing statement of the evidence introduced and of the rulings made on questions of evidence on the trial of the above cause at the present term is approved and ordered filed among the papers of the cause as a part of the record thereof.

142 Dallas, Texas, February 25, 1905.

EDWARD R. MEEK,
U. S. District Judge.

Indorsed as follows: # 597, Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Record of evidence introduced and of rulings on evidence. Filed Feb'y 25, 1905; J. H. Finks, clerk.

143 In the Circuit Court of the United States *doe* the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Co., Defendants. } No. 597. In Equity.

I, Geo. W. Parker, who was appointed an examiner in the above styled cause, by order of the court made August 8th, 1904, do hereby certify that at 3 o'clock in the afternoon of Friday, August 26th, 1904, at the principal hotel, now called the Pecos Valley hotel, but formerly called the Commercial, in Pecos, Texas, I was attended by Mr. Maurice E. Locke, of counsel for the plaintiff, and by Mr. Thomas J. Heffner, special counsel for the defendants, for the purpose of examining witnesses in said cause orally, in accordance with the provisions of the 67th rule in equity and other relevant rules and statutes, and in pursuance of said order. Thereupon said hotel having been found not to have rooms convenient for the examination of witnesses, the hearing was by consent and agreement of both counsel present, adjourned to the law office of said Thomas J. Heffner, the same being a convenient place and such adjournment being reasonably necessary for the convenience of the parties.

Thereupon, at the time above specified, and at the office of said Thomas J. Heffner, in Pecos, Texas, I was attended by coun-
144 sel above named for the purpose aforesaid, and the plaintiff called as a witness JAMES B. GIBSON, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth, in said cause, was questioned orally by said counsel and gave answers and testimony as follows:

Testimony of the Witness James B. Gibson.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?

A. My name is James B. Gibson; I reside at Pecos, Reeves county, Texas.

Q. How long have you resided in Pecos, Mr. Gibson?

A. I have been living in Pecos since 1886.

Q. What, if any, official position have you held in Reeves county, and when and how long have you held each of such positions?

A. I held the office of county and district clerk of Reeves county, from November, 1888, until some time about the 18th or 20th of

December, 1902. Since then I have been holding the position of county attorney of Reeves county.

Q. Please state whether in the year 1896 you were acquainted with Mrs. Jennie M. Mettler, and with William A. Hunter?

A. Yes, I was acquainted with both of them—both Mrs. Metler and Mr. Hunter, in 1896.

Q. Where did Mrs. Mettler live in the latter part of 1896 and early part of 1897?

A. She was living in Pecos city in 1896, in December, and I think during the month of January, or early in 1897, she was living in Pecos also.

Q. About how old a woman was Mrs. Mettler at that time?

A. I would think she was about forty—between thirty-five and forty; not over forty.

Q. What was her marital status—was she single?

145 A. She was a widow woman at that time.

Q. Please state whether or not either by your own knowledge or by her statements made to you or in your hearing, you know what her financial condition was at that time?

A. She said to me at that time that her financial condition was not very strong; I don't think she had any money; I know from her statements that her finances were very limited.

Q. What was her occupation at that time?

A. At that time she was dress-making; that is, in December, 1896; she and Mrs. Heitman were sewing for a living.

Q. She was living—I think she was living—she divided the time between Mrs. R. S. Johnson's house and Mrs. Heitman; Mr. Johnson—I will say at that time—she was living with Mrs. Johnson and Mrs. Heitman I think.

Q. Please state what, if any, family relationship existed between Mrs. Mettler and William A. Hunter?

A. They were brother and sister.

Q. How do you know this fact?

A. From her statement to me and from his statement to me; he told me she was his sister and she told me he was her brother.

Q. How long had you known William A. Hunter prior to 1896?

A. I think I first met him in 1894; I might possibly have met him in 1893, but I don't think I met him until 1894.

Q. Where did you form his acquaintance? What was he doing at that time?

A. I met him here in Pecos the first time I met him. When I first met him—at the time I first met him he had been sheriff at Mentone, in Loving county—sheriff and tax collector of Loving county.

Q. Please give all the information you can, in a general way, in regard to the occupations William A. Hunter had been pursuing, where he had been living, and regarding his financial con-

146 dition for the three years next preceding December 1st, 1896?

A. I am satisfied I met Hunter in 1894; I don't think I

ever met him before that time; I met him in 1894 and 1895, and I think I saw him in March, 1896; I didn't see him any more until away in December of that year when he came back out here from Fort Worth; during these years, 1894 and 1895, he spent most of his time at Mentone in Loving county and was sheriff and tax collector of that county during that time. I don't know anything about his financial condition at that time, nor anything about what he had been doing before he came back to this country; I don't know what he had been doing before 1894; I don't think I met him before sometime early in 1894.

Q. About how frequently did you see and meet him in 1894 and 1895? And how well acquainted were you with him?

A. I met him here; I was fairly well acquainted with him; I met him here probably once a month during 1894 and 1895; I met him oftener in 1894 than in 1895; he didn't come down that often in 1895; I remember meeting him in 1896, in March, 1896; our district court was in session and some parties had sued the company in which he was interested and he come here and stayed a day or two while court was in session and went from here to Fort Worth.

Q. That was in March, 1896?

A. Yes, sir.

Q. After that when did you next see him?

A. I saw him on or about the first of December of that same year—between the first and the third of December, 1896.

Q. Please relate the circumstances of your last two interviews with him in December, 1896; state where they were held, and what was said and done?

A. I met him I think during the day, or the afternoon of the second day of December—December first or second. I met him on the street; I had always met him in a friendly manner and he seemed to be quite friendly, and I met him on the street here and we shook hands and I invited him to call on me; I asked
147 him where he was going and he told me he was going—was on his way back up to Mentone, and I asked him to call on me before he went away and he told me he would if he had time; that, I think, was on the second.

Q. That was the extent of your first interview?

A. Yes sir.

Q. In your second interview——

A. The next day—whether it was the second or the third—I had a conversation on two different days; the first took place on the street and on the following day he came to my office early in the morning at the court house; he came in and sat down—took a seat, and the commissioner's court was in session that morning; I had a deputy there, and I don't remember who it was; I turned the matter over to my deputy and spoke to Mr. Hunter; he told me he wanted to see me, and I supposed from the way he spoke he wanted to see me privately; I spoke to him and told him they were holding court

in my office, and if he wanted to talk privately we would go in another part of the building; he got up and he and I went into the county court room—another room not occupied by any person at all; we sat down and had quite a long talk, probably an hour.

Q. What was the general nature of that conversation?

A. He begun to tell me that he had—that he had been away and had earned money enough to go up and finish out his occupancy on some school land that he had taken up, and that he had come back for the purpose of going back on the land and finishing up this period of three year's occupancy and make his proof on the land. We were talking about the future of the country generally; I was telling him what I thought about it—we both seemed to agree on what we thought the future of the country would be. This beet sugar industry at Carlsbad had just been completed, and that was about the first they had made; they had shipped a good deal from the factory that year, and we were discussing it and discussing the amount of sugar the beets turned out and all these things, and he told me he believed this country would finally develop and especially
148 the river valley and all the part that could be irrigated could be finally put into cultivation, and that he was going back up there and go on to his land and if his company did not complete the work they had commenced up there th-t some other company would probably finish it, and that then his land would become valuable and that he could sell it perhaps and get back some of the money that he had put into the irrigation plant.

Q. Did he tell you when he was going to make his actual trip up there?

A. Yes, I think he told me he was going to start the next morning. Yes, he told me he was going to start the next morning; he was going to start up to Mentone on the following morning.

Q. Please state whether you had any connection with the discovery of Hunter's camp on the banks of the Pecos river?

A. Yes, I was with the searching party that discovered Hunter's camp.

Q. How did it happen that you went and searched for Hunter?

A. I think it was on the evening of the 24th of December, that I happened to drop into R. S. Johnson's place of business, and Mr. Johnson was talking to a man by the name of Owing, who had just come back from a trip up the river in search of Hunter. I overheard a conversation between them, and Johnson was settling with Owing for making the trip and Owing told him he had not made any discovery—didn't find Hunter, and after Owing walked out I asked Mr. Johnson about it and he told me—Johnson told me that Hunter had left Pecos about the 3rd or 4th of the month to go up to Mentone and that he had with him a wagon and team and had some provisions and had gone up there to establish some sort of room, or build some sort of shelter to live in and that he was to have been back in about ten days from the time he left and that he had been gone twenty days, or about twenty days, and hadn't returned, and that Mrs.

Mettler, his sister, had become uneasy about him and had first gotten Slack, I think, to go up and make a search and that he had come back without finding any trace of him and then she had gotten this
149 man Owing to go; Slack had gone up on one side of the river and returned on the other and had searched both sides of the river and hadn't found anything of Mr. Hunter or his outfit; so I went on home that night—I think I told Mr. Johnson we ought to go and hunt for him; I went home and went over to a neighbor of mine, Mr. Tulk, and told him about it and told him I was satisfied there was something the matter with him and we ought to go and make a search for him and Tulk agreed to go with me. My wife's brother agreed to go, he was a boy about twelve years old then. This conversation occurred with Mr. Johnson either on the 24th or 25th, and I had my conversation with Tulk either that same night after the talk with Johnson or the following morning. At any rate, I came on to the court house the next day—in the afternoon as I started home Mrs. Mettler crossed the street in front of me, and I happened to think about this matter and I just spoke to her and asked her if she had heard anything from her brother, and she said "No." I told her I would try to organize a searching party and go and look for him. She said she wished I would do so, that she had no money—she didn't have any means to employ anybody to make further search and she seemed distressed about the matter and I told her I would try to get some one to go with me and if I couldn't get any one, I would go by myself.

Q. That is how it happened that you made the search?

A. Yes, sir.

Q. If Mrs. Mettler gave you any description of Hunter's team, or outfit, or the route he was expected to take, or anything calculated to aid you in making your search for the man, state what she told you?

A. I went and made arrangements to go and make the search; I got Mr. Tulk and George Mansfield to go with me; we started I think on the morning of the 26th of December, 26th or 27th, we started to go out there to make the search. We come down through town and I stopped at Mrs. Mettler's boarding place to get a description of the outfit and she gave me a description of the outfit; she told me he had a wagon with an old spring seat, on the
150 back of the seat was branded some brand, I forget what it was, it was too letters connected; he was driving a pair of horses, both of them tolerably thin, one a good deal larger than the other, and one horse had a large flat track and was unshod. The other was a small horse and had a foot like a mule; he had in the wagon some alfalfa hay, some flour and some stove pipe and may be an old stove; and had with him a Winchester rifle; I think that was about all.

Q. Did she tell you in what direction he was going?

A. She told me he started for Mentone. I met Chandler the same morning and he told me—the same morning he left here he said he

met him going down towards the Pecos bridge about a quarter of a mile out of town on the road to the bridge and I came to the conclusion that he had gone that route.

Q. Please describe as well as you can the manner in which you prosecuted the search for him?

A. We took the Barstow road going from Pecos, and followed it until we crossed the bridge on the Pecos river down east there, and after we crossed the bridge we turned up the river on the east side and followed the old Mentone road. I went horseback and the other two men went in a hack—we had provisions, blankets, etc., prepared to stay a week if necessary. We went to make a thorough search; I rode along in advance of the hack probably 150 yards; they followed along slowly; I was searching for anything that might indicate his whereabouts and particularly was looking for wagon tracks or trail, and after we crossed the river and started up on the other side, there were a great many wagon tracks crossing the road in every direction; the Mexicans had been in there from Barstow hauling wood, and I knew I couldn't distinguish one track from another, and I just watched the country until we passed what they call Rock crossing, ten or twelve miles above the bridge. After we passed that point—that was a great camping point—these wagon tracks were not so many, there very few, and so I begun to watch closely for the wagon tracks in the road. At a point about fifteen miles above the bridge and about two or three miles above Rock crossing I discovered
151 wagon tracks turning to the left—turned to the right out of the road; the road was running a little west of north and the wagon tracks left the road and turned about southwest; I pursued these tracks about 100 yards and they led right up against a heavy, dense mesquite thicket; there seemed to be a slough running about north and south—about the same direction of the road, and there was very heavy brush; at that point it seemed that the horses had been driven up against that brush and seemed to stop; he had to back the wagon a little and then turn right square around to the right so short the wheel cut under the bed; he turned back north and started about the same direction that the road was leading; I got to that point and waited till they came up with the hack; I spoke to them and Mr. Tulk cut off a little mesquite stick and measured the tracks of the horses; it was plain to be seen that one was a good deal larger than the other; he measured them to see, and there was an inch or more difference in the two horses' tracks. We came to the conclusion that that was the trail; I told Mr. Tulk to go back and follow the road and I would follow the trail, and he seemed to run parallel with the road and kept right along with the slough. I followed the trail about a half mile and it turned south again; there was some cow trails there that went towards the river—I called Mr. Tulk, or motioned to him, and followed the trail along—it run over brush with the wagon; I got some distance ahead of the hack and I got out of the thick brush and come to a little glade—an open place;

I looked across the glad- to the other side, perfectly open, and right in the edge of the brush, probably a hundred yards ahead of me, I saw a wagon standing there and saw the alfalfa hay; I could see the bales of hay and some buzzards sitting on the wagon and around in the trees; I stopped and looked at it and came to the conclusion that was the outfit; so I waited till the men came up in sight and I turned my horse and rode back a little ways and told them the outfit was right there; they drove on up; Mansfield jumped out and came along with me.

Q. That was the history of the search?

A. Yes, sir.

152 Q. How was the point at which you found the wagon—state with reference to the road, about how far was it from the road?

A. It must have been four or five hundred yards at least to where the wagon was standing.

Q. Between the wagon and the road at that point what was the character of the country?

A. It was dense mesquite thicket, very dense mesquite brush.

Q. Was the wagon visible from the road?

A. No sir, you could not have seen the wagon 100 yards, except where it was, there was a little open glade; beside that glad- there was not a place as big as this room for half a mile; you couldn't have seen it a hundred yards.

Q. How far had the wagon traveled over the dense thicket after leaving the road?

A. From the point he left the road, when he struck the slough and turned up—the brush was not so thick as he went along parallel with the road, but when he turned in towards the river he struck this thick brush. From that point to where the wagon was, say about half a mile, I think, the brush was very dense.

Q. With no trail except the cow trails?

A. Nothing but the cow trails.

Q. How far was this from the Rock crossing?

A. From three to four miles from the Rock crossing.

Q. Was the Rock crossing a recognized camping place?

A. Yes, that was a camping place; it was an old camp ground and everybody going up there camps at the Rock crossing. The road leaves the river there. It makes a bend there and it is a good watering place and it is the only place the road strikes the river after leaving the bridge. You travel up the river maybe a mile and you leave the river about a mile above the bridge and you don't strike it any more until you strike it at Rock crossing. After you leave it at that point I don't know where you strike it

153 again; you get away off from it, a mile and a half or two miles; I don't think you come near it again until you come to Mentone.

Q. Would this place where you found the camp appear to be a suitable camping place?

A. No, sir, it is not a suitable camping place; it is very secluded; it would be very inconvenient to reach it as a camping place.

Q. About how far is it from Pecos to Barstow?

A. About seven miles.

Q. How far is it on the Pecos and Barstow road from Pecos to the river?

A. About a mile and a half.

Q. How far from the river to Barstow?

A. About five miles.

Q. How far east from the river, on the Pecos and Barstow road does the Mentone road turn off to the north?

A. It is only probably two or three hundred feet east of the end of the bridge.

Q. This is recognized as a traveled road?

A. Yes, sir, it was at that time, it has been fenced up since then.

Q. In the nature of a trail through an open country?

A. At that time it was open entirely.

Q. You have given a history of your search up to the point when you discovered the camp. I will get you to describe the camp as you found it there and what occurred, beginning at the point you left off.

A. Mansfield and I—I started right up, and the boy jumped out and came with me, I told him not to come up; I imagined from the appearance of everything that there was some—I felt like there might be something there I would rather he would not see, but he insisted on coming with me. Mr. Tulk was tying his team and Mansfield walked along beside me. When we got to the wagon—the wagon was standing with the tongue pointing to the southwest—

on the left hand side of the wagon and near the end of the
154 tongue was a set of harness, harness for two horses, complete;

on the left hand side of the wagon and right beside the bed of the wagon there was a pallet made down; the spring seat had been taken off the wagon and turned upside down and there was a wagonsheet or tarpaulin, I think it was a wagon sheet, spread down and the top of it had been spread full width about the size of quilts or comforts; then the end of the sheet had been drawn up over the entire bed and was drawn up until the end of it come up even with the other end resting on the wagon seat. The bed had the appearance—had the shape of a man in it. It looked just exactly like there was a man lying in there. A good sized man, the form was there almost perfect. George Mansfield walked up and started to take hold of the cover; I fully believed at the time, and so did he, that there was a man in it; he turned it loose and looked back at me; he was pretty badly scared; I says "Pull it down, if there is a man in there he won't hurt you;" there was nobody in there; that is the condition the bed was in; on the right hand side of the wagon and near the front wheel was two wooden buckets—water buckets, with ropes ten or twelve feet long tied in the bails; in the bottom of these buckets was some red sand, or water marks, show-

ing that water had been in there and evaporated; about an inch of water had been in each bucket and evaporated, and there was a sediment on the edge of the bucket. About twelve feet on the north side there was a dead horse laying with a rope around his neck and tied to a small mesquite bush, about ten feet further north of the horse. It appeared that the horse had been struggling to get to this hay in the wagon and he had walked around this way trying to get to the hay.

Q. Going around in a semi-circle?

A. Yes, sir, he couldn't go around straight on account of the brush; he could go only half way round, and he had made a half circle, four or five or six inches in the sand; he had evidently fallen and was lying with his head to the bush; he probably lay there a day or two before he died. Just behind the left front wheel leaning against the axle of the wagon was a Winchester rifle; there were no cartridges in it; I think there was a hull in the barrel, and on the opposite side, that the bed had been made down, there had been a little fire made, covering a spot ten or twelve inches in diameter—a little round spot, and there was a skillet sitting on that place; the lid of the skillet was leaning against it and there had been something cooked in it, looked like there might have been some meat or something cooked in it; in the wagon was two bales of alfalfa hay, some light bread, one of these ten gallon cans about two-thirds full of flour and some canned goods of different kinds; I don't remember what all, but not a great deal of it; there was an old axe, I think, and a lot of stove pipe and possibly an old stove, I can't remember; I think that was about all there was in the wagon; a good deal of old stuff in there, I can't remember now.

Q. Did you find any harness?

Q. Yes, there was a set of harness—harness for two horses—just in front of the wagon, about even with the tongue and on the south side of *of* the wagon tongue—there was a set of harness for two horses, complete; two bridles, two collars and everything; I noticed that particularly, because I wanted to know whether the other horse had been ridden away; there was only one horse there and the other one was not accounted for.

Q. What was the description of the horse you found there?

A. It was a small brown pony, as well as I remember.

Q. What was the apparent cause of its death?

A. Undoubtedly starvation.

Q. Did you find any foot-prints?

A. Yes, we searched around there for some time, expecting to find the man right around there; after we failed to find the man we began to look for foot-prints; we discovered foot-prints going in the direction of the river, southwest from the wagon, leading towards the river; we followed the foot-prints; we all stayed together while making the search, and followed the foot-prints to the river and fol-

lowed them back, showing three or four times he had gone
156 to the river. We followed the foot-prints down to about twenty or thirty feet, I think about twenty feet, from where the foot-prints went down to the edge of the water, and we found foot-prints turning to the right and going in the direction of the river at a point higher up on the river bank, and we followed these foot-prints up to the bank of the river.

Q. At the bank of the river where the foot-prints had gone and returned, the first point to which you followed the foot-prints, what did you find?

A. At that point there was a little peninsular running out in the stream two or three feet; at that point he had gone down;—his foot prints were very distinct, where he had gone down on that little peninsula and there was the print of the bottom of the water bucket, as if he had set the bucket down there. The bucket had been set there.

Q. These tracks I understand you to say went to the river and returned?

A. Yes, sir.

Q. These tracks from the peninsula merged into the line running to the river, at a point where the tracks turned off leading to the river at a point higher up the river?

A. Yes, sir.

Q. The tracks leading from that point off to the right and leading to the river, what indications did you find at the end of these tracks?

A. At the end of these tracks there were two tracks; where these tracks approached the river bank, the edge of the bank—the top of the bank, there was a little slant; the bank was perfectly level up to the point where it dropped off perpendicular, there was about two feet of a slant, running out about eighteen or twenty inches, and then the bank dropped off perpendicular: the foot-prints came up on this slant and was side by side on that slant and turned about half facing the river and standing on the slant; the tracks were about six inches apart; the left foot had slipped about five
157 or six inches toward the bank of the river.

Q What, if anything, did you find there in the way of a bush or a root?

A. Down in front of the tracks about ten or twelve inches below the top of the bank there was a mesquite root freshly broken off; it had been pulled and the root had been pulled up this way from the river, and this had been freshly broken off just down underneath the bank.

Q. Did you examine that line of tracks to ascertain whether they led back from the river to the wagon?

A. Yes, we examined them as soon as we discovered them, everything was perfectly smooth; there was no vegetation on the ground and the sand was as smooth as this floor and every track could be seen as distinctly as could be; when we first saw these tracks di-

verging to the right and going to the bank at different points, we thought that might be the explanation of the thing, that he had drowned; we all agreed and says "Let's see whether these tracks come back or not;" we begun to look from that very point, for tracks returning; we couldn't see any tracks returning; after we saw the tracks on the slant, and they had slipped and the mesquite broken off, we didn't make any further search.

Q. What conclusion did you come to at that time?

A. We came to the conclusion that the man was drowned.

Q. What was the character of the river at that point, about how wide was it?

A. The river at that point was about 100 feet wide.

Q. About how deep?

A. At that time—the time we made this discovery, there had been a rise, and the river had been about twelve inches higher recently than at that time; there was a turn in the river; it come down in a kind of southeast direction and made a sweep around this way, and the current of the river came right up to this bank; the first time we were there the strongest current was within five or six feet of the bank of the river.

Q. About how deep would the water be there?

158 A. I can't tell you how deep it was at that time.

Q. Did you ever measure it?

A. Yes, afterwards; between the time I was there at that time there had been a rise and there was a sand bar thrown up against the bank at that point—a considerable bar. We did measure it afterwards and at a point about sixteen or eighteen feet out from the bank right opposite these foot-prints, the water must have been six or eight feet deep—six feet any way; it was more than six feet; I suppose it must have been seven feet.

Q. I will ask you to examine the paper you have in your hand, which is marked "Exhibit A to J. B. Gibson's deposition," and state whether or not it is a substantially correct plat of the camp you found on the east bank of the river and its surroundings, and whether the figures and accompanying key substantially represent the location of the various objects concerning which you have been testifying?

A. Yes, that is a very good plat. That shows it very well, with the exception of the figure 4, showing where the harness ought to be; that is all right, I guess it is near enough correct.

Q. It is substantially a correct map of the situation?

A. Yes, I think that is a very good map.

Q. How many kinds of human foot-prints did you find there on the first trip?

A. Only found the foot-prints of one man; at least the foot-prints we found were all the same; they had evidently been made with the same shoe.

Q. About what was the size of these foot-prints?

A. The shoe must have been an eight and a half or nine; it was

long and slender; a neat looking track; looked as if it had been made with an eight and a half shoe.

Q. Were they the foot prints of a shapely foot or of an ill-clad foot?

A. They were the prints of a neat shoe.

159 Q. What is the nature of the current of the river at that point? Is it swift or slow?

A. At that time it was swift.

Q. What was the nature of the bed of the Pecos river generally, along that part of its course?

A. It is quicksand bed most everywhere, with a few exceptions.

Q. Was any search made for indications as to whether any horse had been tied in that vicinity—search for the broken end of a halter?

A. Yes, we made search for the other horse; we didn't make search at that time; we did on the 29th when we went up again.

Q. State whether any indication was found of a horse having been tied and broken loose?

A. Mr. Slack and I searched the ground, and couldn't find where any horse had been tied; we did find where a horse with a large flat track had gone away and came back to the wagon in nearly a dozen different places, a track nearly exactly like the track of the horse that pulled the wagon in there; we were satisfied that it was the same horse, Slack and I came to that conclusion.

Q. You made no further search that day? What did you do after examining the camp on this occasion, which I believe you said was on the 27th of December?

A. We left everything just exactly as we found it—never touched a thing and come on back home—come back home that night.

Q. Did you have an interview with Mrs. Mettler?

A. Yes, I had an interview with her, I did after I come back from up there; I sent Mrs. Mettler word what we had found; I sent her word by the Baptist minister; I told him to tell her we had found his outfit; I didn't care to tell her myself; I told him to tell Mrs. Mettler what we had found; as I passed Mrs. Johnson's that evening she called me and asked if we found anything, and I went in and told her what we had found; she asked me if I would go with her the next day and show her the place—the camp, and I told her "Yes."

160 Q. Did you go?

A. Yes, sir.

Q. That was what day of the month?

A. It must have been the 29th of December.

Q. Who, if any one, went with you?

A. R. S. Johnson and Mrs. Johnson and Mrs. Mettler; I think George Mansfield went back and a boy named Manning, Henry Slack and a man named White and somebody else I have forgotten who.

Q. These persons were all there at the camp that day?

A. Yes, sir, that is the crowd of people that went back on the 29th.

Q. Did Mrs. Mettler inspect the camp?

A. Yes, sir.

Q. Did she make any statement as to the ownership of the horse and wagon, or any of the articles found there?

A. Said that was her brother's outfit.

Q. On that occasion was any search made by yourself up and down the river for tracks of this man who had made the tracks above the camp?

A. Yes, we made search for tracks, and we dragged the river a little bit; some one took along a garden rake and we tied a rope to it and threw it in the river and dragged the river a little, not a great deal.

Q. Any tracks found?

A. No tracks leading away from this point that I described at the point above the peninsula; we didn't find any tracks leading away from the river.

Q. Did you at any other point, except the one you first described?

A. No, sir.

Q. Find any indication as to how the party had gotten away from the point where the broken root was?

A. No, sir, not the least indication.

Q. About how large was this open glade in which the camp was situated?

161 A. It must have been a hundred yards across from east to west and probably a hundred and fifty yards north and south.

Q. Surrounded on all sides by heavy brush?

A. Yes, sir, except a little opening right to the river; the wagon was standing right on the edge of the little glade, and there was a little opening right to the river.

Q. On the opposite side of the river what was there?

A. There was not much brush—tolerably open on the west side from that point.

Q. Was there salt grass about in the glade?

A. There were some scattering bunches of salt grass in the glade, I think. There was a good deal of salt grass out in the brush; in the road he come in there—getting in there, there was lots of salt grass, the grass was—lots of places it was almost waist high.

Q. How does salt grass grow, does it make a solid turf or does it grow in bunches?

A. It grows in bunches generally.

Q. State whether or not on the 18th of January, 1897, you took Mrs. Mettler's affidavit of proof of death of William A. Hunter, for the Fidelity Mutual Life Association of Philadelphia?

A. I took her affidavit sometime about that time.

Q. Do you remember whether you took her affidavit to a supplemental statement?

A. Yes, I took two to three affidavits of Mrs. Mettler with reference to the claim about that time.

Q. Have you ever seen William A. Hunter since your interview with him on the day of his disappearance from here on the third of December, 1896?

A. Yes, sir, I have seen him.

Q. When and where?

A. I saw him in Dallas; I don't remember the date; I saw him at his trial in Dallas, in April of this year.

162 Q. He was on trial in what court?

A. He was on trial in the district court there—criminal district court, of Dallas county, Texas.

Q. Did you have any conversation with him?

A. Yes, I had a conversation with him.

Q. Please state whether he recognized you and spoke to you and called you by your name?

A. He didn't seem to recognize me; I walked up and shook hands with him and he looked at me and didn't seem to recognize me at first; he looked at me in a kind of dazed way; finally he did say—I told him who I was—finally he says, "Oh yes, you used to be county clerk out there." He seemed after so long a time to recognize me. I asked him—I just remarked to him that I didn't think he treated us right in shipping off that way and causing us so much anxiety about it and so much trouble, making search for him; I says I don't think you treated we people right out there slipping off from us that way and making us think you were dead and havin/ us make search for you that way; I told him I had mourned him as dead; he says "I don't see how in the world you ever put such a construction on it as that." That is the only conversation I ever had with him.

Q. Please state, if you know, when Loving county was organized?

A. As near as I can remember it was organized in July, 1893.

Q. About what was the population of that county just prior to the taking of steps to organize?

A. It must have been earlier than 1893 it was organized; the tax rolls for that year I think—Loving county was attached to Reeves county, and the tax rolls for 1893 showed resident tax-payers in that county for that year—only showed one tax-payer—one who rendered poll tax.

Q. About what was the population, or do you know, at the time of the organization, and how was that population made up?

A. They presented a petition with about 175 names signed

163 to it, to the commissioner's court of Reeves county, asking for organization; on that petition there was possibly fifteen or twenty white men, the balance were Mexicans.

Q. Do you know what became of the effort to construct the irrigation ditch at Mentone, in Loving county?

A. I don't know, except that the company was reported broke;

they went into the hands of a receiver, I believe. They abandoned the work, and the people left there.

Q. When did that occur?

A. In 1894 or 1895; I think they abandoned it early in 1895.

Q. Was that the company Hunter was connected with?

A. Yes, it was known as the Eastern Pecos River Irrigation Company.

Q. What became of the population of Loving county?

A. After the abandonment of that, they disappeared; there were none of them there at all in 1896; there was no one in Mentone in the latter part of 1895 and 1896.

Q. Loving county in 1896 was practically depopulated?

A. Yes, sir.

Q. About what was the market value of land in the vicinity of Mentone in December, 1896?

A. I cannot tell you.

Q. Can you say whether there was such a thing as a market value?

A. I don't think there was any market value; never heard of any being sold, or any demand for it.

Q. Was there at that time a considerable amount of school land that could have been entered under the forty-year act, in December, 1896?

A. Yes, there was land there at that time that could have been entered.

Q. Did you testify in behalf of the plaintiff in Mrs. Mettler's suit against the Fidelity Mutual Life Association?

A. Yes, sir.

164 Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. There was one thing with reference to the articles found around the wagon that I failed to mention; that was a coat; there was a coat about like the one I have on, except it was dark; it was a sack coat, dark color, not very heavy, laying about seven or eight feet in front of the left wheel of the wagon, and on the first day I was there, and after we discovered the camp, I went and picked this coat up and went through the pockets, and in one of the pockets there was a letter addressed to Mr. W. A. Hunter, that had been written him from Fort Worth; just a short, friendly letter; nothing in it particular—nothing particular in it.

Q. Did you find any valise at the camp?

A. No, sir, there was no valise there.

Q. Find any over-coat?

A. No, sir, no overcoat.

On cross-examination by Mr. HEFFNER, the witness testified as follows:

Q. Did you know Mrs. Mettler's husband in his lifetime?
A. Yes, sir.
Q. Where did he die?
A. He died at Mentone.
Q. In Loving county?
A. Yes, sir.
Q. How long had you known him prior to the time of his death?
A. He died, I think, in 1894; I knew him from 1893 up to the time of his death, I think that must have been——
Q. How long did he live in Loving county—Mentone, prior to the time of his death *time of his death?*
165 A. He had resided there perhaps a year?
Q. In what business wa- he engaged at that time? Prior to his death?
A. I think he was interested in that Eastern Pecos River Irrigation Company, and he was also a county officer.
Q. What office did he hold?
A. I think he was county attorney of that county.
Q. When was he elected county attorney of Loving county, at the organization of the county?
A. I don't think he was elected at the organization; he may have been.
Q. He was here at the time the county was organized?
A. I won't be positive about that, I don't know whether he was elected at the time or appointed by the court officials.
Q. When was Hunter elected sheriff and tax collector of Loving county?
A. He was appointed, he was not elected at the time of the organization, I know that.
Q. Was he afterward appointed to the office.
A. I think he was appointed.
Q. What property, if any, did Mr. Mettler own, either in the town of Mentone or Loving county, at the time of his death.
A. He took up a section of school land, or a part of a section, I don't know whether he owned it at the time of his death or not.
Q. Did he own any other property either in the town of Mentone or in Loving county?
A. I don't know of any.
Q. Don't know of any other property he owned?
A. No, sir.
Q. What property, if any, did William A. Hunter own, either in the town of Mentone or Loving county, in December, 1896?
166 A. I think he had taken up a section of school land there in the vicinity of the town.
Q. Had he taken up this section of land prior to December, 1896?
A. Yes, sir, I think so.

Q. Did he take it up as school land?
A. Yes, it must have been taken up as school land.
Q. What had he done on this land, if you know, prior to December, 1896, in the way of improving it?
A. I don't think he had done anything at all.
Q. Do you know he hadn't done anything?
A. I do not; the only way I knew he had ta-en up any land was through the records of the clerk's office.
Q. When did William A. Hunter leave this country for the East? You testified he was away from here for some time?
A. About 1896.
Q. What time?
A. He passed through here in March, 1896.
Q. On his way East?
A. Yes.
Q. Did you see him at that time?
A. Yes.
Q. Did you have any conversation with him?
A. Yes, I had a conversation with him.
Q. Did he tell you where he was going?
A. No, sir.
Q. Did he tell you when he expected to return?
A. No, sir.
Q. How long was he absent on that occasion?
A. He left in March and didn't come back any more until the following December.
Q. Left in March of what year?
A. 1896.
167 Q. And returned in December, 1896?
A. Yes, sir.
Q. The same year?
A. Yes, sir.
Q. Where was his sister, Mrs. Mettler, during the time he was absent?
A. During his absence she was here in town.
Q. In Pecos?
A. Yes, sir.
Q. Had her husband, Mr. Mettler, died prior to that time?
A. Yes, I think Mettler died in 1895.
Q. You stated that during that time she was engaged in the millinery business?
A. Yes, she was sewing part of the time I think; yes.
Q. She remained here all the time during his absence?
A. Yes, during Hunter's absence.
Q. How soon after Mr. Hunter's return to this county—how long after Hunter's return to this county until you met him—until you saw him, in December?
A. I think I saw him just after he came in; I think the train came in at night and I saw him the next morning.

Q. Know whether he had been to Mentone prior to that time?

A. No, sir, I don't think he had from what he said to me.

Q. I will ask you, Mr. Gibson, to state as near as you can, all Mr. Hunter said to you in that conversation you had with him in the county court room in December, 1896?

A. I don't know how the conversation came up, but he told me that he wanted to talk to me, and I thought from the way he spoke, he wanted to talk privately, and I told him we would go in another part of the building where we would not be interrupted; there was quite a number of people in the office; we got up and went into the county court room; after we got in there we sat down

168 and begun to discuss the country in a general way, and I remember very well of speaking about this beet sugar industry and about the beet factory in Carlsbad—Eddy, New Mexico, then; we discussed that pretty thoroughly, and we were talking about the development of this valley here under irrigation system, and he finally told me that he had come back—I think he began this way, he says "I have made enough money to run me for a while," and says "I have come back here to go back upon my land and live out the time necessary and make my proof of occupancy, and in the meantime if our company is never going to complete, or finish the canal, some other company will finish it and I will stand a chance to sell my lands and get some of the money out that I have put into the thing."

Q. That was about the substance of your conversation?

A. Yes, sir.

Q. Did he not in that conversation tell you for what purpose he was going up to Mentone? Did he discuss with you the fact that he was going to Mentone——

A. He told me he was on his way up there; I did not ask him what he was going for.

Q. Did he tell you for what purpose?

A. Yes, he was going up there to re-occupy these lands and remain on them for the length of time required and then make his proof of occupancy, and then went on to say he could go away if the country didn't develop—he could go away—it was not necessary for him to remain longer, and if the company did develop it he could keep his lands or sell them and get some of the money that he had put in the irrigation plant.

Q. Through whom, Mr. Gibson, did you first learn the fact that the supposition was that something wrong had gone with Mr. Hunter?

A. What do you mean by that?

Q. I mean by that the fact that he didn't return within the time he had set, that the supposition was something had happened to him; when did you learn that?

169 A. I learned that through Mr. R. S. Johnson, I think.

Q. You have stated that you, in company with others, made

a search for Mr. Hunter; I will ask you if that search was instituted on your part at the request of Mrs. Mettler herself, or not?

A. As near as I can remember, this is what was said with reference to the matter, the first that was ever said between Mrs. Mettler and me about the search: I saw her crossing the street ahead of me, and I spoke to her and asked her if she had heard anything from her brother; that was the next day after Mr. Johnson tole me about his being gone. She said she hadn't; she seemed distressed about it, and went on to tell me about sending this other man up there and not hearing anything from him, and I think I told her, or rather I suggested that I would try to get a searching party.

Q. Your recollection now is that the request did not come from her, but the proposition was made by you?

A. I think that is exactly what I said to her, that I would try to get a searching party and go and make a search.

Q. Do you know whether she had been with the searching party that had preceded you?

A. No, sir, I don't know.

Q. You don't know whether she was or not?

A. No, sir.

Q. Did she accompany your searching party?

A. No, sir.

Q. Did she ever accompany you to the place where Hunter's wagon was found?

A. Yes, sir, she accompanied the party up there I think on the 29th of December.

Q. What, if anything, did she do on reaching the place where the wagon and other things were found?

A. She didn't do much, Mr. Heffner; she walked around there and seemed to try to size up—seemed to be interested and
170 seemed to try to see what there was there to show what had become of her brother; she picked up the coat and run her hand in the pocket and took out the letter and glanced over it and put it back and put the coat down; that was about all she did that attracted any attention; she did about like the balance of us.

Q. Did she go to the river herself?

A. Yes, I think she went to the river.

Q. Did she go to the place where the broken bush was found—tracks found on the bank of the river?

A. Yes, sir.

Q. Did she assist the party in dragging the river?

A. No, sir.

Q. Did she direct any other member of the company to drag the river in search of the body? Did she direct any other member of the company to drag the river in search for Hunter's body?

A. I don't remember that she did. I don't remember that she said anything about searching the river.

Q. From what was found at the wagon, Mr. Gibson, what provis-

ion had Mr. Hunter made in the way of feed-stuff—what did you find in the wagon in the way of eatables for himself?

A. We found rations—a scant ten days' rations only for one man; there was about two-thirds of a ten-gallon can—must have been twenty pounds of flour in the can; there was some light-bread—baker's bread.

Q. Any meat?

A. No meat, some canned goods—some canned corn and tomatoes.

Q. Any coffee?

A. Some coffee, I think.

Q. Any sugar?

A. I don't remember.

Q. Any cooking utensils?

A. There was a small skillet, is about all that I remember of.

Q. Anything else?

A. I don't remember anything else—I think there was—I
171 don't remember anything about cooking utensils.

Q. What did his bed consist of?

A. His bed consisted of this wagon sheet—either a wagon sheet or tarpaulin—it was tolerably old; I am pretty sure it was a wagon sheet, and either two or three of these common cotton comforts; there must have been three; two of these comforts and an impression was made—appeared to have been an impression—there was evidently one of these comforts *was* used for cover and the others used to lay on.

Q. Had the bed already been made when you found the wagon?

A. Yes, sir.

Q. Know what other feed stuff there was, for animals; did he have anything aside from the alfalfa which you have already testified about?

A. I don't think there was anything except two bales of alfalfa, and one bale had been destroyed.

Q. What had destroyed it?

A. Loose stock.

Q. Any indication that loose stock had been feeding upon it?

A. My impression is it was the other horse; I believe the other horse stayed right there until the other one died.

Q. You believe all the tracks about there was the same animal?

A. Not all of them; some other animal had made a great many tracks.

Q. Did you institute search for the other Hunter horse?

A. No, sir, didn't search any further than while we were searching for the man; we went out in the brush for half a mile around there; we made a pretty thorough search up and down the river for him. We kept searching for the horse at the same time, didn't make any special search for the horse.

Q. Do you know the extent of Mr. Hunter's acquaintance with the Pecos river and the road along the banks of the river? From Pecos to Mentone?

A. I should think his acquaintance would be pretty extensive.

Q. Can you state how often, approximately, he traveled that road?

172 A. No, sir, he usually came down on the train.

Q. Do you know that he was familiar with the Rock crossing on the river?

A. I think he was.

Q. Do you know that he was familiar with the place as a camping place?

A. I don't know that he was.

Q. What is the distance from Pecos to Rock crossing?

A. By way of the Pecos River bridge, I should think it was at least twelve miles.

Q. How long, ordinarily, would it take to drive from Pecos to Rock crossing in a wagon?

A. I don't know, Mr. Heffner, about that.

Q. Can't you approximate about the time he would have taken—it would have taken Mr. Hunter to drive that distance?

A. I would think from Pecos to the point where his outfit was found, with the team he had and the load and route he took, that it was a pretty good half day's drive.

Q. What was the distance from Rock crossing to where you found the wagon?

A. It must have been three miles.

Q. What time of day, if you know, did Mr. Hunter leave Pecos on that day?

A. It was late; it was nearly noon when he left here, so Chandler told me.

Q. You don't know of your own personal knowledge?

A. No, sir, only what he said.

Q. What is the distance from the road to the point where Hunter's wagon was found?

A. It must have been four or five hundred yards straight across; I should judge about four hundred yards; it is hard to tell about these things; it may not be so far and it may be a little further; I think that is about the distance.

173 Q. I believe you stated already that cow trails lead from the road in the direction of the river, traveled by him to the river?

A. Yes, the cow trails were on the course—while he didn't follow these trails all the way; he crossed the slough along the trail; after he got across the slough he left the trail and turned to the right and struck out through the brush; the trails were not much advantage as far as a wagon going through was concerned; there was no place wide enough for a wagon to pass through at all, the brush was thick and very heavy.

Q. Was there any particular objection to the selection of this place as a camping place?

A. There would have been for me.

Q. What would have been your objection?

A. My objection would have been the distance from the road that I would have to travel over that brush to get into the river—into the water; it was a very unfrequented spot where the outfit was found; I have learned that since; I knew it was a very lonely place.

Q. Is it not a fact that the Pecos river is a very crooked stream?

A. Yes, it is.

Q. Is it not a fact that there are several similar places along the river to where Hunter's wagon was found?

A. Well, as far as the river is concerned there are similar places.

Q. Are there not a great many similar places to that as far as the timber is concerned?

A. No, sir, not many; I don't know of another place like it; I don't know of any other place where there is so much brush, heavy mesquite brush; they are twelve or fourteen feet high and cover the country for several miles up and down the river and half a mile or three-quarters wide along the stream, and it is very dense, heavy brush. I don't know of another place like it anywhere on the river;

I remember it was a mystery to me why he went in there at
174 that time. I come to the conclusion that one of his horses must have taken sick, or he found that it was later than he thought it was and he didn't think he could make the next watering place and night overtook him. I was sure it was night when he was traveling in there.

Q. Why?

A. From the way he went through the brush and went over trees and places he went in; it would be such an unusual thing for a man to go in there.

Q. The indications were that he selected that place after night?

A. I came to the conclusion that it was night when he went in there. In the first place, what caused me to come to that conclusion was from the fact that when he left the road driving south, he run up against some heavy mesquite brush; before he stopped he got up so deep that he had to back out—he couldn't turn around, and I came to the conclusion that it must have been dark when he got into that place.

Q. Was there any building material on Hunter's wagon of any kind?

A. No, sir, I think not.

Q. Was there any tent?

A. No, sir, no tent.

Q. I believe you stated that there was a stove?

A. I am not positive about that—there was some pipe, stovepipe.

Q. If there was any stove, was it a cooking stove or a heater?

A. It must have been a cooking stove.

Q. Can you state whether or not there was a stove—whether there was or was not a stove?

A. I can tell you by referring to that affidavit I made. I would not be positive that there was a stove; it seems to me like there was but I would not be positive.

Q. What was the size and age of the large horse of the two Hunter horses?

A. I don't know that I ever saw him.

Q. What was the age and size of the small horse?

175 A. That horse I don't think could have been over thirteen or fourteen hands high; just a small pony.

Q. About what was his value?

A. I suppose he was worth twenty-five dollars.

Q. What was the value of the harness you found there?

A. It was not worth a great deal.

Q. Were they fairly good harness?

A. Probably worth seven or eight dollars; probably not worth that much.

Q. What was the value of the wagon?

A. About twenty-five dollars; might have been worth more, no more than twenty-five or thirty dollars.

Q. What was the aggregate value of the other things found there at the wagon?

A. I don't remember what was found; the Winchester rifle was worth probably eight or ten dollars; the outfit was not a very valuable one.

Q. The Winchester was worth eight or ten dollars; you said there were several comforts, how much would they be worth?

A. Probably a dollar and a half.

Q. The two coats?

A. Only one coat.

Q. Worth how much?

A. It was not worth much, a half dollar or a dollar, or such a matter.

Q. How were you able to determine about how many trips Hunter made from the wagon to the river?

A. I don't think we determined just exactly how many he made but we were able to determine by the number of tracks going towards the river and returning to the wagon.

Q. Had he gone to the river at any other point, either above or below this particular point?

A. I think not, with the exception of this other point

176 & 177 Q. This point he had gone and returned and this other point where he went and did not return, was about twenty feet above?

A. Yes, sir.

Q. What did you find there?

—. I only found his tracks going to the bank of the river and where he stood on this little slant.

Q. Where there any tracks returning from that point to the wagon?

A. I didn't see any. I looked for tracks returning from that point to the wagon and didn't find any at all.

Q. Were was it you found the broken mesquite?

A. I found it in the bank just above. Down under the bank just underneath where these foot prints were on the bank.

Q. At the point where there was no indication that he had returned from the river?

A. Yes, sir.

Q. What did you state was the condition of the river at that time? Was it low or high water?

A. At the time I was there on the 27th of December, the river was up a little; it had been up about twelve inches—twelve or eighteen inches higher than it was at that time and was falling at that time.

Q. At that time where was the current in the river, on the east or west bank?

A. East bank.

Q. Was that the condition when you went up there on the 27th of December, 1896?

A. Yes, sir.

Q. The day on which you found Hunter's wagon?

A. Yes, sir.

Q. About what was the depth of the Pecos river at that point?

A. I only know that from having measured it on the 20th of January following, at that point.

Q. Was there no measurement of the river until the 20th of January following?

178 A. No, sir, no measurement until in January, I think about the 20th.

Q. What was the condition of the river as to the current, was it further away from the east side of the river?

A. There had been a rise in the river between the 29th of December and the 20th of January and there had been a sand bar thrown up against the east bank and extended along from this point a little above where these foot prints went; there had been quite a sand bar thrown out there three or four feet wide and then extended down to this point (indicating on the plat) about twenty feet below, and that threw the current further away from the east bank; the current must have been about eight feet from the bank—the main bank.

Q. You had no means of knowing what the depth of the Pecos river was on December 3, 1896, at that point?

A. No, sir.

Q. Was the current in the river swift or sluggish, at that point?

A. The current was swift every time I was there at that point; the river made a sweep around there from the west—came from the west and threw the current right against the edge of the east bank and was swift there.

Q. Do you know whether or not William A. Hunter owned or h
with him a valise or overcoat?

A. No, sir, I do not; I don't know whether he had one or n
there was none found there on the ground.

Q. Do you know whether he left Pecos with an overcoat or vali
or both?

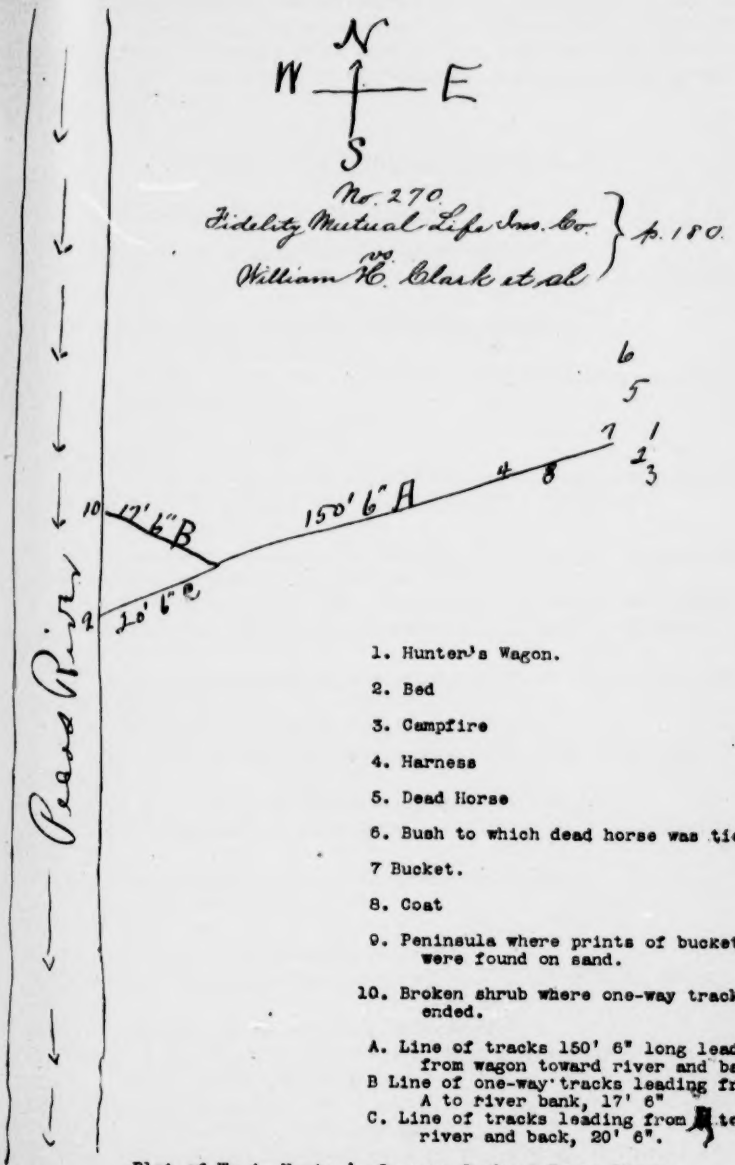
A. No, sir, I do not.

J. B. GIBSON

I do certify that the paper attached and marked "Exhibit A
the deposition of J. B. Gibson" is the identical plat mentioned
the direct testimony of the said witness.

I do further certify that the testimony so given by
179 said witness J. B. Gibson was reduced to typewriting by
as the same appears at large above, and afterwards was re
over to the said witness and was signed by said witness in my pr
ence and in that of such of the parties and counsel as were in
tendance; the genuine signature of the said witness appear
above.

(Here follows diagram marked p. 180.)



1. Hunter's Wagon.
2. Bed
3. Campfire
4. Harness
5. Dead Horse
6. Bush to which dead horse was tied.
7 Bucket.
8. Coat
9. Peninsula where prints of buckets were found on sand.
10. Broken shrub where one-way tracks ended.

A. Line of tracks 150' 6" long leading from wagon toward river and back.
B Line of one-way tracks leading from A to river bank, 17' 6"
C. Line of tracks leading from [illegible] te river and back, 20' 6".

Plat of Wm.A. Hunter's Camp on Bank of Pecos River.

181 Thereupon the plaintiff called as a witness R. S. JOHNSON, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by said counsel, and gave answers and testimony as follows:

Testimony of the Witness R. S. Johnson.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?
A. My name is R. S. Johnson; I reside in Pecos, Reeves county, Texas.
Q. How long have you resided in Reeves county?
A. I have lived here since 1891.
Q. What official position, if any, do you hold in Reeves county?
A. I am county treasurer.
Q. How long have you been so?
A. Since November, 1898.
Q. Please state whether in the fall of 1896 you were acquainted with Mrs. Jennie M. Mettler and with William A. Hunter?
A. Yes, sir, I was.
Q. Where did Mrs. Mettler live at that time? And how close was the acquaintanceship between her and your family?
A. During the summer of 1896 she was at my house frequently and stayed there for six weeks or two months; probably in September and October.
Q. Did that acquaintance and frequency of visits continue on up until December, 1896?
A. Yes, until about the first of January, 1897.
Q. What was Mrs. Mettler's financial condition at that time, if you know?
A. I think she was in straightened circumstances.
Q. Do you know that of your own knowledge, or by statements about it?
A. I presume I know it from her statements.
182 Q. And from observation?
A. Yes, sir.
Q. In what occupation was she engaged?
A. She was doing some sewing around; she was sewing at my house.
Q. That appeared to be her only occupation?
A. Yes, sir; how I particularly know that she was in straitened circumstances for money, when we went to where her brother was supposed to have been drowned, I hired a hack and had to pay for it; she told me she didn't have any money.
Q. Do you remember the occurrence of William A. Hunter's disappearance the third of December, 1896?
A. Yes, sir.

Q. How long had you been acquainted with William A. Hunter before that time?

A. I think I first formed his acquaintance in about 1893, during the organization of Loving county.

Q. When did you see him for the last time before his disappearance?

A. I can't say positively; I think the last time I saw him was about the first of December; probably saw him on the second of December.

Q. About the first or second of December?

A. Yes, sir, that is the last time I saw him.

Q. Have you seen him since his disappearance?

A. Yes, sir.

Q. When and where and under what circumstances?

A. I saw him at his trial in the district court of Dallas county, Texas, in May, I think of this year—April.

Q. Did you have any conversation with him at that time?

A. Yes, sir.

Q. Did he recognize you and speak to you by name?

A. Yes, sir.

Q. Have any conversations with him about the matters and things at Pecos?

A. Yes, sir.

183 Q. Is there any doubt in your mind in regard to his identity?

A. No, sir, not a bit.

Q. When did you first learn that Hunter had left Pecos bound for Loving county?

A. I think at noon of the third of December, 1896, when I went home to dinner, my wife told me that he had gone that morning—that forenoon probably about ten o'clock, I think she said he left; she saw him when he drove away.

Q. You didn't see him go?

A. No, sir.

Q. Did you ever have anything to do with making a search for Hunter after he left on the third of December?

A. Yes, sir.

Q. When did you first concern yourself in that matter, and how did you happen to do it, and what did you do?

A. My wife—I didn't have any conversation with Mrs. Mettler about it; when I got home at noon from my place of business, Mrs. Mettler had been to my house and talked with my wife, and my wife talked to me and said Mrs. Mettler was getting uneasy about her brother not coming back, and she wanted me to try to get somebody to go up and look for him. I suppose along about the 18th or 20th of December, I got a young man to go up there and look for him.

Q. Where did you send that man?

A. I sent him to Mentone.

Q. Did he come back and make a report?
A. Yes, sir.
Q. What was that report?
A. I couldn't find anything of him, and could see no sign of him.
Q. Did you report that to Mrs. Mettler?
A. I think I did.
Q. What next was done?
A. Next I went and saw Henry Slack and got him to go.
Q. When was that?
184 A. It was the next day or two after this young man returned, probably the 23rd or 24th of December.
Q. What did he do?
A. He come back and reported—made the same report; he went up first what is known as the River road the way Hunter was supposed to have started, and said he was going to go down and cross the Pecos here towards Barstow and then turn up on the other side of the river. Slack took that route; he crossed the river at Mentone and come down on this side.
Q. Examined both sides of the river?
A. Yes, sir.
Q. Reported that he couldn't find any trace of Hunter?
A. Yes, sir.
Q. Did you communicate that fact to Mrs. Mettler?
A. Yes, sir.
Q. What next? Did you have anything to do with the search for Hunter and his belongings?
A. I had a conversation with Mr. Gibson about it and my recollection is Mr. Gibson said he would go and make a search, but I am not positive about that.
Q. You didn't go with Mr. Gibson on the first trip?
A. No, sir.
Q. Did you hear after Mr. Gibson returned from the trip he made on the 27th of December, of the discovery of the camp?
A. Yes, sir.
Q. Then did you make a trip up there?
A. Yes, sir.
Q. When was that and who was with you on that occasion?
A. My recollection is it was on Monday morning after Mr. Gibson come back; I don't remember whether he come back on Saturday or Sunday; I may not have the days of the week exactly right, but it occurs to me that Gibson went up on Sunday and come back Sunday night and we all made the trip up there Monday.
185 Q. That was about what time of the month?
A. About the 29th of December.
Q. Who went on that occasion?
A. Mrs. Mettler, my wife and my son about ten or eleven years old and myself went in a hack; George Mansfield, Mount Manning and Mr. Gibson went horseback all in the same crowd together; we

went down and crossed the wagon bridge and went up the road Hunter was supposed to have traveled.

Q. Was there any one else there at the camp that didn't go with you?

A. Yes, about the time we got there, or a few minutes afterwards, Henry Slack, J. A. White and Tom White, who were then living at Midland, came up; then after an hour or so Sheriff John Avery, from Barstow, and his two little boys, came up in a buggy.

Q. Please state whether before your trip to Hunter's camp on the 29th of December you had any information, by hearsay or otherwise, of the fact that Hunter's life was insured in favor of his sister, Mrs. Mettler?

A. Yes, I did.

Q. When and how did you receive that information?

A. I received it from my wife.

Q. About when was it you received this information?

A. I think it must have been about the tenth of November.

Q. It was before Hunter returned to this part of the country?

A. Yes, my wife told me that Mrs. Mettler was looking for Hunter to come out here and go up and live on his land—the plan was for him to go up and prepare a house for her and then he was to come back and take her up there; and before he got here she had this conversation, and the plan was made, so Mrs. Mettler said, and during that conversation she told my wife he had his life insured in her favor and my wife told me about it.

Q. So you knew from that source at the time you went to Hunter's camp on the 29th, that Hunter's life was insured in favor of his sister?

A. Yes, sir, I did.

186 Q. Please describe the camp in a general way, as it appeared to you, when you went up there on the 29th of December, and in that connection please examine this paper, which is marked "Exhibit A to the deposition of J. B. Gibson," and state whether or not it is a substantial!- correct plat of the camp and its surroundings as you found them at that time.

A. Yes, this is substantially correct.

Q. Will you describe in a general way what you found there?

A. We found a wagon and a set of harness, a camp fire and a bed made down by the side of the tongue of the wagon, a dead horse in behind the wagon, and foot tracks leading from the wagon down to the bank of the river; and at the wagon there was—the wagon was pointing with the tongue down the river, which would be south or southwest; and on the left hand side of the wagon, as you sit in the wagon towards the front, there was a Winchester rifle sitting in right behind the left front wheel of the wagon, and on the right hand side there were two buckets; one had a rope tied in the bail of the bucket, ten or twelve feet long.

Q. Did you find anything in the way of a coat there?

A. Yes, there was a coat there right at the head of the bed.

Q. Did you find any valise or an overcoat?

A. No, sir.

Q. What did you find in the way of provisions for a man?

A. There was a large lard can—about a 50-pound lard can, sitting in the front end of the wagon and it was about half full of flour, and some lightbread, a loaf that had been probably half used up, and there was a small wooden box containing some canned fruits.

Q. Did you find any bacon or salt meat or anything of that kind?

A. I don't think there was; I think there was some lard; I have forgotten whether any bacon or not.

Q. No kind of meat that you remember?

A. I don't remember of any.

Q. You say you found some foot tracks leading from the wagon down to the river; did these tracks appear to return or not?

187 A. Yes, they came and went.

Q. At the river bank where the tracks had gone down and returned, what indications did you find?

A. Right at the water's edge there was the imprint of a bucket, where the bucket had been set down in the sand and the lower rim had cut down in the sand, it was probably full of water, and it made an imprint there in the sand.

Q. Aside from this line of tracks that passed from the wagon to the river and back, what, if any, human foot tracks did you find of the same kind of tracks?

A. Right here at this exhibit (indicating on the plat) I find a little difference in it; my recollection is that the tracks here at "9," the tracks that went up to "10" went right up the bank of the river this way; instead of diverging from this line here, my recollection is the tracks from the wagon come down here to this point "9" and here was a little peninsula, and then went down the bank of the river and he evidently pulled water out of the river, the imprint of the bucket was left there, and returned up here, having gone two or three trips; one set of tracks went right up the bank of the river right here at this point.

Q. So you would make this plat "Exhibit A" to show the point of divergence of the two lines of tracks leading to the river nearer to the river bank than this plat?

A. Yes, sir, that is all the difference I see.

Q. The line of tracks that diverged from the main line and went up the river, in which was did these tracks lead?

A. Led up the bank of the river.

Q. Turn in towards the river at any point, or do they approach the river?

A. They had evidently come from the wagon down here; may have gone down under the bank, I can't tell, but here is where they turned and went up to this point.

Q. About how long was that line of tracks?

188 A. About twenty feet, I would say, or twenty-five.

Q. What was the condition of things at the terminus of that line of tracks, and where was the terminus of the line?

A. They terminated right here on the bank of the river.

Q. At the point marked "10" on that plat?

A. Yes, sir, both tracks stopped right there. Apparently he set both feet opposite each other and there they stopped, right there.

Q. What indication, if any, did you see of the tracks returning from that point, or going from that point?

A. That is all that could be seen; these tracks came right up here.

Q. What did you find at that point "10," aside from the foot prints, if anything?

A. There had been a root or limb stuck in the bank that had been broken off there.

Q. That was at point "10" on the plat?

A. Yes, sir.

Q. Did you make any examination to see whether you could find any indications of the party who made these one-way tracks having left the point marked "10" on the plat?

A. Yes, sir.

Q. What investigation did you make?

A. We just looked around to see whether he could have gotten away from there; we didn't see any tracks.

Q. Didn't find any indication of the party leaving point "10"?

A. No, sir.

Q. Did you make any search up and down the river on that occasion for tracks?

A. Yes, sir.

Q. What, if anything, did you find?

A. Couldn't find any at all.

Q. You say you found a dead horse near the wagon?

A. Yes, sir.

Q. Was this horse loose, or tied?

189 A. Tied.

Q. To what?

A. To a mesquite tree, with a rope.

Q. Could the horse reach the wagon from where he was tied?

A. No, sir.

Q. What were the indications in regard to the conduct of that horse?

A. He evidently remained there a long time from the time he was tied; the wagon had two bales of alfalfa hay, and my recollection is there was half a bale in the wagon, or laying outside of the wagon at the back end, and the horse was tied in such a way that he could reach within about eight or ten feet of the wagon and couldn't get close *close* enough to get it, and he cut a half-moon circle tramping back and forward, evidently trying to reach the wagon.

Q. And he died there?

A. Yes, sir.

Q. Did you make any search for indications of another horse having been tied there and having broken loose?

A. I didn't see any such indications.

Q. Did you make search around among the trees so you would have seen it if there had been any such thing there?

A. Yes, sir.

Q. You say there was harness found?

A. Yes.

Q. What parts of the harness was there?

A. I think the harness was complete.

Q. Did you notice the bridles?

A. Yes, sir.

Q. Both?

A. Yes, two bridles and a full set of harness.

Q. I don't remember whether I asked you if you found a valise or overcoat?

A. Yes, you asked me.

Q. Was this camp visible, or not, from the road way?

190 A. No, sir, it was not.

Q. What was the character of the country between it and the road?

A. The camp was between a half and three quarters of a mile, is my recollection, from the wagon road; and there was very dense mesquite brush between the camp and the road.

Q. About how high were the trees?

A. Ten or fifteen or eighteen feet high?

Q. Was that point, or not, a frequented spot?

A. I would not think that it was.

Q. Were there any signs of its having been used as a camping place by other parties?

A. No, sir.

Q. Do you know whether there was a well-known camping place on the Pecos river in that vicinity?

A. There was above there about a mile, a good camping place.

Q. Is there a camping place below? At any crossing of the river.

A. Only at the rock crossing, as far as I know.

Q. How far down is that?

A. About two and a half miles.

Q. A camping place about two and a half miles below and another about a mile and a half above?

A. Yes, sir.

Q. Please state with reference to the place where the camp was found, whether it was easy or difficult of access from the road?

A. It is very difficult of access.

Q. What, if anything, did Mrs. Mettler say on that occasion in regard to the ownership of the horse and wagon or any of the articles found there? As far as you know?

A. She said the horse was hers; it was my understanding that the wagon and harness belonged to Powers; I don't know that she said so; I understood that before I left home, but I don't remember about that.

Q. Do you know what other horse Hunter had with him besides this little pony?

191 A. He had the Powers horse.

Q. Were you acquainted with the Powers horse?

A. Yes, sir.

Q. Did you ever see the Powers' horse after that time?

A. Yes, sir.

Q. When and where?

A. I think on the 20th of January, I think, I saw the Powers horse, his dead body, about a mile and a half from the depot at Barstow in Ward county. About a mile and a half south and a half mile east of the depot at Barstow.

Q. Please describe that Powers horse, in a general way?

A. He was a large bay horse with a bald face and a Roman nose, big round nose, and three white feet.

Q. About how old was the horse?

A. I think the horse was ten or twelve years old.

Q. Was the body in a good state of preservation at the time you saw it?

A. Yes, sir.

Q. You had no difficulty in recognizing the horse?

A. Not a bit in the world.

Q. Please describe the horse that was found at the camp lead?

A. I don't remember that I had ever seen that horse before; it was a small brown horse, thirteen and a half or fourteen and a half hands high; brown or dark bay horse.

Q. If you know, please state how Mrs. Mettler habitually received her mail in the latter part of 1896 and the early part of 1897?

A. She got it through my mail box in the postoffice in this city.

Q. It was deposited in your box?

A. Yes, sir.

Q. How would she get it?

A. I would take it up home at noon when I went home to dinner.

Q. Please state whether you remember in the early days of January, 1897, any special piece of mail matter you received for

192 Mrs. Mettler?

A. Yes, I do.

Q. What piece of mail matter was that?

A. It was a receipt from the postmaster at Pecos to Mrs. Mettler for a registered letter.

Q. What did you do with that receipt when you got it from your box?

A. I took it home; tried to give it to my wife and she would not accept it, and I went on in the front room and gave it to Mrs. Mettler herself.

Q. Do you remember to whom the letter for which this receipt was given was addressed? If so, state to whom?

A. Yes, sir, my recollection is it was addressed to the Fidelity Mutual Life Insurance Company, Philadelphia, Pennsylvania.

Q. It was a receipt issued to whom?

A. Mrs. Jennie M. Mettler, by George E. Sapp.

Q. Please place the date as nearly as you can?

A. That would be a little hard to do; it was probably ten days after this search up the river. Something like ten days.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I don't know whether it is material or not; I will relate it any way: In regard to this registry receipt, I took it home from the postoffice, had gotten it out of my box that morning, and when I went home at dinner, I went in through the kitchen—went in through the back way, as is always my habit; this Hunter business was a daily conversation between my wife and me, morning, evening and night; we talked about it all the time from the time he come out here and started up to Mentone for months afterwards; on this particular occasion when I come home and had this receipt in my pocket, I didn't think about the receipt; I went in and was talking to my wife and she says "Mrs. Mettler don't know—I
193 asked Mrs. Mettler what company her brother was insured in and she said she didn't know," and Mrs. Mettler was then in the front room of my house and that drew my attention to the registry receipt; and I reached in my pocket and drew it out and handed it to my wife and says "That is a receipt where she registered a letter yesterday to the insurance company notifying them, I presume, that her brother was dead;" I guessed at what the letter contained; I says "You give it to her," and she says "No, I won't touch it," says "You go and give it to her," says "She just told me she didn't know what company her brother was insured in."

Q. That is what impressed upon your mind the occurrence of the registry receipt?

A. Yes, sir.

Q. That is the only thing you recollect?

A. Yes, sir.

On cross-examination by Mr. HEFFNER, the witness testified as follows:

Q. How long had you known William A. Hunter, prior to December, 1896?

A. About three years, I will say.

Q. Where did he reside during that time?

A. My understanding is he lived at Mentone when I first knew him, in 1893.

Q. In what business was he engaged at Mentone?

A. My understanding was they were preparing to take out this irrigation ditch up there; and he was elected, I understand, sheriff of the county.

Q. When was he elected sheriff of the county?

A. At the organization of the county, I think, that is my understanding. I am not positive about that; I think he was.

Q. How long had you known Mrs. Mettler prior to December, 1896.

A. I don't believe I ever met Mrs. Mettler until her husband died and was brought down here for burial, and I think that was in April.

Q. Of what year?

A. 1896.

194 Q. Where did Mrs. Mettler reside after the death of her husband?

A. She principally lived with H. T. Heitman's family.

Q. In what business was she engaged from the time of her husband's death until the month of December, 1896?

A. I cannot say she was engaged in any business; she visited around, different families a good deal, and was sewing some, I know; how much I can't say.

Q. What was your means of knowing her financial condition?

A. Well, Mrs. Powers had to stand good for Mr. Mettler's burial expenses; I understood that from Powers himself; and at the time we went up to look for Hunter, about the 29th of December, she told me she had no money to hire a hack with; the only was we had to go was to go to the livery stable and get a hack, and I went and hired a hack myself and paid for it.

Q. From the circumstances you relate, you knew she was without means?

A. Yes, sir.

Q. You have no other reason for believing so?

A. No, sir.

Q. Do you know whether her husband was possessed of any property?

A. He was not that I know of.

Q. Did you see William A. Hunter in Pecos the day he left Pecos to go to Mentone?

A. I don't think I did see him that day.

Q. Did you see him the day before?

A. I think I did.

Q. Have any conversation with him?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know for what purpose he went to Mentone on that occasion? Of your own knowledge?

A. No, sir.

Q. Do you know from hearsay?

A. Yes, sir.

195 Q. You state you don't know of your own personal knowledge for what purpose he went to Mentone?

A. No sir.

Q. When and how did you first learn the fact that Mrs. Metler had become uneasy on account of the absence of her brother William A. Hunter—from what source did you learn that?

A. From my wife.

Q. What did you do on learning that fact, if anything?

A. My wife told me when he left here, probably the next day, or the second day, after he was gone, that he would be gone about ten days, which would be about the twelfth or fourteenth of December, and Mrs. Mettler was expecting him back that day. My wife told me this; the next day my wife told me that Mrs. Mettler was still looking for her brother he didn't come; the next day and the next day and then she began to get uneasy, my wife said. The next day she was more uneasy, and along about the 18th or 19th she had prevailed on my wife try to get me to try to get some body to go up there and look for him.

Q. You sent a man up there to make an investigation; did she solicit you to make the effort?

A. Yes, through my wife.

Q. Then, it was at her solicitation that you sent a man to Mentone for the purpose of making an investigation, about which you have testified?

A. Yes, sir.

Q. Who did you send up there on the first trip?

A. I cannot tell you the young man's name; he was a cow boy here in the country and while I knew him at that time—he was a light complected young fellow about twenty-two or twenty-three years old.

Q. Was his name Baird?

A. Yes, sir, Baird, that is it.

Q. How long was he gone?

A. He was gone two days.

Q. He came back and reported that he had failed to find Hunter?

196 A. Yes sir.

Q. Did you send any one else?

A. Yes, I got Henry Slack to go.

Q. How long was he gone?

A. My recollection is he was gone two days.

Q. He came back and made a similar report?

A. Yes, sir.

Q. Then what was done after that time, Mr. Johnson, so far as instituting search?

A. I think I had a conversation with Mr. Gibson and he said he would go; I am not positive that I had a conversation with Gibson, anyway, he went.

Q. Did you go with him?
A. No, sir.
Q. It is a fact that Mr. Gibson made two trips and you went with him the second trip?
A. Yes, sir.
Q. Had the camp been found when you went?
A. Yes, sir
Q. By whom had it been found?
A. By Mr. Gibson and Mr. Tulk.
Q. What was the distance, if you know, from the traveled road to the Pecos river at that point on the Pecos river at which the wagon was found?
A. I should think between a half and three quarters of a mile, straight in.
Q. Did you travel the distance from where the wagon was found to the road—did you go over the ground?
A. Yes, coming back, yes, I went pretty near straight in and out. Mr. Gibson came up—he rode—Hunter had left the wagon road—the main wagon road and started into the brush and got tangled up——
Q. That is what I was going to lead up to; did you travel that distance by wagon tracks?
197 A. Yes, part of the way.
Q. Did you follow it all the way?
A. No, sir, not all the way.
Q. How far did you follow it?
A. About two thirds of the way.
Q. Describe the condition of the wagon tracks as you saw them at that time, as to being straight or otherwise?
A. Hunter had turned off the main wagon road and the brush was so thick he couldn't get straight into the river, and he had to follow along the brush and practically parallel with the wagon road for several hundred yards, probably a quarter of a mile, and then it was one hundred and fifty or two hundred yards away, and there he made a straight turn to the left and went straight in to the river, and at that point I diverged from the wagon road and followed on until I struck the wagon tracks and followed right on up to his camp.
Q. From what you saw and the physical signs and indications, is it your opinion that he made the drive from the road to the river in the day time or after night?
A. I can't say.
Q. Which do you believe—which do you think?
A. It was probably late in the evening; I believe when he turned—first turned, he made a miscalculation; I think he thought he could go in there; he might have done that in day time or it might have been dark.
Q. Do you know what time he left Pecos on that day?
A. Of my own knowledge I do not.

Q. Do you know whether or not he left before noon?
A. I was told he left about ten o'clock in the morning.
Q. What is the distance from Pecos to the Rock crossing that you have described? Going by way of the river bridge?
A. About fourteen miles, I think.
Q. What is the distance from Pecos to the upper camping place which you have described?
198 A. About sixteen or seventeen miles.
Q. About how long would it take a person to drive the distance from Pecos by way of the river bridge to the Rock crossing on the Pecos river?
A. In the condition that Hunter's team was in, I think it would take him fully half a day.
Q. What was the distance from where his wagon was found to the Rock crossing?
A. I will guess at it; I think about three miles.
Q. Was it above or below the Rock crossing?
A. Above.
Q. What was the distance from where the wagon was found to the upper camping place that you have described?
A. About three-quarters of a mile or a mile.
Q. Do you know that the wagon that Hunter used on that occasion belonged to Emmerson Powers?
A. I don't know of my own knowledge.
Q. Did any one of the horses belong to him?
A. Yes sir.
Q. How long after the wagon was found before you saw the Powers' horse?
A. About twenty-two or twenty-three days.
Q. How did you identify the body of that horse, by flesh marks or brands?
A. Flesh marks.
Q. Alone?
A. Yes sir.
Q. Did he have a brand?
A. Yes sir.
Q. Do you know what brand?
A. I don't know.
Q. Did you know at that time?
A. I think I did.
Q. Did you examine for brands at that time?
199 A. I did not.
Q. What is the distance from where Hunter's camp was found to the place where the horse was found?
A. I don't know, I think ten or twelve miles.
Q. Did he have a rope about his neck, or a halter?
A. No, sir.
Q. You stated, Mr. Johnson—on a little peninsula that you have

described and to which Hunter had gone, that you were never able to retrace his steps from that point?

A. No, sir.

Q. Were there any prints leading from that point——

A. Not from the peninsula; the tracks led from the wagon to the peninsula and back to the wagon, and back to the peninsula and went down under the bank where the peninsula was and then the tracks went right up on top of the bank and led right straight up the river to this point "10" (indicating on plat marked "Exhibit A" to J. B. Gibson's deposition).

Q. Was that as far as you were able to follow his tracks?

A. Yes sir.

Q. There were no other tracks?

A. No, sir.

Q. Were there any other tracks leading from the wagon to the river bank?

A. No sir.

Q. None at all?

A. No sir.

Q. Was the imprint of the water bucket you spoke of on this peninsula?

A. Yes sir.

Q. Was it at that point where the mesquite limb was found broken?

A. No, sir.

Q. At what point was that?

200 A. It was at point "10" as indicated on the plat, and the peninsula was located at point "9." The mesquite limb was at point "10" as shown by the diagram.

Q. Were the tracks leading from the wagon to point "10"?

A. No, sir, they led from the wagon to the peninsula, and then from the top of the bank from point "9" to the point "10," going straight up the river.

Q. Then it was from point "10" you were never able to trace him?

A. Yes, sir, that is the point.

Q. Were there any physical signs at that point to show that he had gone to the river and fallen in the river?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. How, in your opinion, did he get away from that point?

A. My opinion is he walked off on grass roots. It could have been done.

Q. Your opinion is he walked off on grass roots?

A. Yes, sir.

Q. Were you ever able to discover his tracks at any other point away from the wagon except at the point you have already described?

A. No, sir, his tracks were around the fire.

Q. Did you make any search for horses' tracks leading from the wagon?

A. Yes, sir, there had been some loose horses in there and one particular horse.

Q. Did you discover any horse's tracks except those that might have been made by loose animals?

A. No sir.

Q. You didn't discover any tracks indicating that the horse had been ridden from that point?

A. No, sir, there was so much—there was a good deal of horse signs; stock horses had been there and particularly one large
201 footed horse; my opinion is it was a range stallion; I have been told since that there was one running in there at that time; he had made lots of signs tramping all around.

Q. Did you make any measurement of the tracks made by the horses driven by Hunter on that occasion?

A. No sir, I did not.

Q. Did Hunter have with him on that occasion provision for man sufficient to last, say, ten or twelve days—any number of days?

A. There possibly was flour enough to last a man ten days, but that is all.

Q. Any other article of food or provision for man that would have lasted as much as ten days?

A. No, sir.

Q. Of what did the provision consist; what else did you find except the flour?

A. Probably six or eight cans of tomatoes and corn; my recollection is it consisted all of tomatoes and corn.

Q. You found no meat of any kind?

A. No, sir.

Q. Find any sugar?

A. I don't remember.

Q. Find any coffee?

A. Yes, sir.

Q. How much coffee?

A. I can't state, I think a package, probably two packages of coffee.

Q. How many pounds?

A. Pound packages.

Q. Was there anything else on the wagon besides the alfalfa and the flour and the other stuff that you have described?

A. Yes, there was a stove.

Q. Describe that stove.

A. It was a heating stove with two lids and three joints of
202 pipe—stove pipe.

Q. Anything else? Was it a new stove or an old stove?

A. An old stove.

Q. Was there anything else?

A. I don't remember anything else.

Q. You have already testified that he had a bed, buckets and a Winchester?

A. Yes, sir.

Q. Any building material?

A. No, sir; I think there was a piece of canvas or wagon sheet, I am not positive about that.

Q. What, if anything, did Mrs. Mettler say when you communicated to her the fact that neither Mr. Slack nor the other fellow, Baird, had been able to find her brother?

A. I didn't have any conversation with her personally about Baird; and as to what she said about Slack, I did have a conversation with her about Slack, but I don't remember just what she did say.

Q. Don't remember anything she said?

A. No, sir, I don't remember anything she said.

Q. You testified about taking from the office a registry receipt for Mrs. Mettler showing that a letter or package of some description had been sent by her to the insurance company; do you know what that package contained?

A. No, sir.

Q. Do you know whether or not the proof of death of William A. Hunter was made in the town of Pecos?

A. No sir, I do not.

Q. By her or anybody else?

A. No, sir.

Q. When did you say it was you took from the office this receipt with reference to the time that Hunter left Pecos?

A. I think probably it was the 8th or 10th of January, 1897; a week or ten days after we had returned from hunting for Hunter.

203 Redirect examination by Mr. LOCKE:

Q. At the camp on the 29th of December, when you and Mrs. Mettler and all of you were there together, what was Mrs. Mettler's manner as to exhibiting any emotion?

A. She was wearing a sun-bonnet and she kept her handkerchief up over her face, and outside of that I didn't notice any emotion at all. She kept her bonnet well drawn forward and kept her handkerchief well over her face and about all I could see was her eyes.

Q. Please state whether her voice gave any signs of emotion, breaking down, or tears?

A. No, sir, I didn't discover any; she did very little talking.

R. S. JOHNSON.

I do further certify that the testimony so given by the said witness, R. S. Johnson, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said

witness and was signed by the said witness in my presence and in that of such of the parties and counsel as were in attendance; the genuine signature of the said witness appearing above.

I do further certify that the plat referred to in the testimony of said witness as "Exhibit A to J. B. Gibson's deposition" is the identical plat so marked and found attached to the deposition of the witness J. B. Gibson.

J. B. GIBSON, recalled by the plaintiff.

Testimony of the Witness J. B. Gibson, Recalled by Plaintiff.

Direct examination by Mr. LOCKE:

Q. In your original examination, Mr. Gibson, you spoke of hearing a conversation between Mr. Johnson and one Louis Owing in regard to a trip that Owing had made to search for William
204 A. Hunter. Do you know whether Louis Owing went by any other name than that? If so, what other name did he go by?

A. He went by the name of Baird.

Q. What became of Owing, alias Baird?

A. He went from here—he was arrested—he and his brother were here together; they were arrested in Arizona—he and his brother were arrested in Arizona; they were connected with that Black Jack train robbery; they were convicted and sent to the penitentiary for five years each.

J. B. GIBSON.

I do further certify that the testimony so given by the witness J. B. Gibson when recalled by plaintiff, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by said witness in my presence and in that of such of the parties and counsel as were in attendance; the genuine signature of the said witness appearing above.

At the close of the examination of James B. Gibson, when recalled by plaintiff, it being 6:30 o'clock p. m., the examination was by me adjourned, to be resumed at the same place at nine o'clock in the forenoon of Saturday, August 27, 1904. At said time and place I was again attended by the same counsel as on the preceding day.

Thereupon the plaintiff called as a witness PATRICK CARSON, who being by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth, in said cause, was questioned orally by counsel and gave answers and testimony, as follows:

Testimony of the Witness Patrick Carson.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence.
A. Pat Carson, I live now at Grand Falls; am twenty-eight years old.
205 Q. Where were you living in December, 1896?
A. Barstow.
Q. Barstow, Texas?
A. Yes, sir.
Q. In what business were you engaged there at that time?
A. In the drug business.
Q. Were you acquainted there at that time with the families Capt. A. D. Irvin and R. H. Keese?
A. Yes, sir.
Q. What was the relationship between those two families?
A. Keese was a son-in-law of A. D. Irvin.
Q. Who was Miss Lula Irvin?
A. Daughter of A. D. Irvin.
Q. At that time, in the month of December, 1896, did you keep a blotter or day-book in which you made your original entries of your sales of merchandise?
A. Yes, sir.
Q. Have you that book with you?
A. Yes, sir.
Q. Who made the entires in that book?
A. I made the most of them.
Q. At what time, with reference to the making of a sale was it your custom to make the entires on your book of the sale?
A. Immediately after the sale, or at the time of the sale.
Q. Please state whether the entires in that book were correctly made and were relied upon by yourself and your customers in making settlements for merchandise sold to them?
A. Yes, sir.
Q. Please refresh your memory, if necessary, by examining the entries contained in that book of sales of merchandise made during the month of December, 1896, and state whether at any time during that month you sold a bottle of Hall's catarrh cure and charged the same to R. H. Keese?
206 A. There was a bottle of Hall's catarrh cure charged to R. H. Keese on December 5th, 1896.
Q. Please state whether that was the only sale of Hall's catarrh cure to R. H. Keese of which you have record as having

been made at any time during the month of December, 1896, and if there were other sales, give the dates of such sales?

A. That is the only charge for Hall's catarrh cure made to R. H. Keese that month.

Q. Please state whether it was R. H. Keese's custom at that time to have all his purchases charged to his account or whether he made cash purchases?

A. My recollection is he had everything charged.

Q. Please read the entry of sale of Hall's catarrh cure to R. H. Keese on December 5th, 1896, as you find the same recorded in your blotter of that date?

A. R. H. Keese, Hall's catarrh cure, seventy-five cents.

Q. Where does the date appear under which that sale was made and what does the head-line read?

A. The date appears above that, December 5, 1896.

Q. By whom was that particular entry made in your book?

Q. By me.

A. Please state whether at the time of making that entry you knew it to be a correct record of the transaction which it purports to record?

A. Yes, sir.

Q. Do you know whether that sale of Hall's catarrh — was made to R. H. Keese in person or to some member of his family?

A. No, sir, I don't remember.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir.

PAT CARSON.

207 I do further certify that the testimony so given by the said witness, Patrick Carson, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of both the counsel above-named, the genuine signature of said witness appearing above.

Thereupon, plaintiff called as a witness GEORGE E. SAPP, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was examined orally by said counsel and gave answers and testimony as follows:

Testimony of the Witness George Sapp.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence?
A. George E. Sapp; thirty-nine years old; Pecos, Texas.
Q. What official position, if any, do you hold here in Pecos?
A. Postmaster.
Q. How long have you been postmaster at Pecos, Texas?
A. Since January 1st, 1897.
Q. Were you acting as postmaster here on the second day of January, 1897?
A. I was postmaster at that time.
Q. Please state whether you had been connected with the postoffice at Pecos before that time, and if so, how long and in what capacity?
A. I was clerk in the postoffice for three years preceding that.
Q. Please state whether in the latter part of 1896 and early part of 1897 you were acquainted with Mrs. Jennie M. Mettler, and with Mr. R. S. Johnson?
A. Yes.
Q. Did Mrs. Mettler receive her mail through the postoffice at Pecos at that time?
A. She did.
208 Q. If you remember, please state how it was her custom in December, 1896, and January, 1897, to receive her mail?
A. Part of the time during that time she received it in R. S. Johnson's care; just how long I don't remember.
Q. Please state whether R. S. Johnson had a postoffice box?
A. He did.
Q. Please state whether you remember registering a letter for Mrs. Jennie M. Mettler at any time in the early part of January, 1897.
A. She registered one January 2nd, 1897.
Q. Please state whether you issued your postmaster's receipt for that letter?
A. I did.
Q. Please state what disposition you made of your postmaster's receipt for that registered letter?
A. As well as I remember, I placed it in Johnson's box.
Q. To whom was that letter addressed?
A. To the Fidelity Mutual Life Association of Philadelphia, Pa.
Q. Have you a record of the registration of that letter?
A. Yes, sir.

Q. Have you examined it recently for refreshing your memory?
A. Yes, sir.
Q. When?
A. Today.
Q. Have you in your possession the record of the registration of that letter?
A. Yes, sir.
Q. Please repeat to the examiner, the contents of your record of the registration of that letter?
A. Pecos, Texas, 1/2, 1897; received of Mrs. J. L. Mettler, one letter, addressed to Fidelity Mutual Life Association, Philadelphia, Pennsylvania. G. E. Sapp, P. M.
Q. What, if anything, does your record show as to the date on which that letter reached the Philadelphia postoffice?
209 A. The 7th.
Q. From what source was that information received?
A. My postmaster's receipt from the office at Philadelphia.
Q. Please state whether it is the custom of the Postoffice Department for the postoffice of the designation of a registered letter to send a receipt therefor to the postoffice where the letter was mailed?
A. It is.
Q. Whose property is the record in your possession of the registration of this letter?
A. The Government's.
Q. Please state whether or not you are permitted to let said record go out of your custody?
A. I am not.
Q. Where is the record now?
A. In the postoffice.
Q. Please state whether you were requested by me to produce the original record at your examination, and if so, what your reply was, and why you gave such reply?
A. Yes, such request was made of me, but I do not think the rules and regulations of the Postoffice Department would permit me to do so.
Q. Please state whether, within your knowledge, Mrs. Mettler ever registered any other letter in your office, in or about the month of January, 1897; and if she did, state when such letter was sent?
Q. She registered no other letter that I have any knowledge of.
Q. Please state how many ladies of the name of Jennie Mettler were receiving and sending mail through the postoffice at Pecos, during the month of January, 1897?
A. Only one.
Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?
210 A. I do not.

On his cross-examination, conducted by Mr. Heffner, the witness testified, as follows:

Q. Is it a rule of the Postoffice Department that postmasters do not remove from the postoffice for any purpose, any record therein kept?

A. Yes, sir.

Q. Did Mrs. J. L. Mettler at the time of registering the letter mentioned in your direct examination, or at any other time thereafter, inform you as to what it contained?

A. No, sir.

Redirect examination by Mr. LOCKE:

Q. Please state how many ladies by the name of Mettler were receiving and sending mail at the Pecos postoffice during January, 1897?

A. Only one.

Q. Please state, if you can, from your personal memory what lady it was who sent the registered letter for which you issued a receipt to Mrs. J. L. Mettler?

A. The lady was Mrs. Jennie L. Mettler.

GEO. E. SAPP.

I do further certify that the testimony so given by the witness Geo. E. Sapp was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties or counsel as were in attendance; the genuine signature of the said witness appearing above.

——.

Thereupon the plaintiff called as a witness Mrs. M. H. MANNING, who having been by me carefully examined and duly sworn to testify the *the* truth, the whole truth and nothing but the truth in said cause, was examined orally by counsel and gave answers
211 and testimony as follows:

Testimony of the Witness Mrs. M. H. Manning.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence.

A. M. H. Manning; residence Pecos, Texas.

Q. Where were you living during the month of December, 1896?

A. At the Emerson Powers place, about two miles from Pecos.

Q. Who had been living in that house before you moved there?

A. Mr. Emerson Powers' family.

Q. About how long had you been living there on the second day of December, 1896?

A. We had just moved there; I don't know just how long, only a few days.

Q. Were you acquainted in December, 1896, with Mrs. Jennie M. Mettler and her brother, William A. Hunter?

A. I had met Mrs. Mettler a time or two, and her brother she introduced me to out there at the house; that is the only acquaintence I had with him.

Q. Do you know whether Mrs. Mettler had been living with the Emerson Powers family at that place or not?

A. Yes sir, she had been living with them there at that place.

Q. Please state whether you saw Mrs. Mettler and Mr. Hunter, or either of them, at your house near Pecos on or about the second day of December, 1896.

A. Yes, sir, they were both there; I don't know whether the second or the third, but it was about that time.

Q. Where were they and what were they doing when you first saw them on that occasion, and how far were they then from your house?

A. I saw them coming up the road from towards town, coming towards our house; I saw them up at the big gate.

Q. How long did they stay at the big gate, approximately?

212 A. I don't know, a half an hour or an hour; they were there a good while.

Q. About how far is the big gate of which you speak from the house?

A. It is a quarter or a half mile, something like that.

Q. After they left the big gate where did they go?

A. Came to the house.

Q. What, if anything, did they tell you was the object of their visit, and which one made that statement to you?

A. Mrs. Mettler, she told me they wanted to get a horse and a wagon for her brother to go up the river, to a place I believe they call Mentone.

Q. Did they get the horse and wagon?

A. They did.

Q. What horse did they get?

A. They got a brown horse of Mr. Emerson Powers.

Q. Please describe the horse as well as you can.

A. He was a brown horse, tolerably large horse, and I think he had a white foot or two; I am not sure about that.

Q. Do you remember anything about the horse's face?

A. It seems to me like he had some white in his face; I don't remember though, we had him in our care such a little while.

Q. What, if anything, did Mrs. Mettler say to you at that time about the length of time they would want to keep the horse and wagon?

A. She said they would want them for two or three days.

Q. In what sort of a vehicle did they leave your place?

A. Well, they carried the horse with them; they carried the horse

and wagon back with them; I think they worked the horse they drove out to the buggy and trailed the buggy behind.

Q. By what authority did they claim the right to take the horse?

A. She said she had a letter from Mr. Powers, telling her she could have the horse to work up there.

Q. About how long did Mrs. Mettler and Mr. Hunter stay at your house on that occasion, and what were they doing besides
213 getting the — and wagon?

A. They must have been there three or four hours; they came early in the afternoon and stayed till nearly sundown.

Q. Were they in your company during all of that time?

A. No, sir.

Q. What were they doing?

A. They were up stairs in the room Mrs. Powers had her things stored in.

Q. Stayed in that upstairs room most of the time?

A. Yes, sir.

Q. Do you know whether Mrs. Mettler had anything stored in that room?

A. I think she did.

Q. Do you remember whether they took away any of the articles stored there?

A. She took away some things, I don't know what, some bedding for one thing.

Q. Did she take away much from the place?

A. No, sir, very little.

Q. Please state whether you ever saw the Power's horse after that?

A. I did not.

Q. Do you know from hearsay, or otherwise, what became of the horse?

A. Yes, sir, I heard that he died over close to Barstow somewhere.

Q. Do you remember the occurrence of Mr. Hunter's dissappearance?

A. No, sir, nothing more than he left our house that afternoon.

Q. I mean do you remember the occurrence of Mr. Hunter's disappearance from Pecos, on the 3rd of December, 1896, and his supposed drowning?

A. Yes, sir, I remember that.

Q. About how long was it after the visit of Mr. Hunter and Mrs. Mettler until you heard the talk about his drowning?

A. I don't remember, but it seems to me it was along the last of December.

Q. Do you know, or can you set forth any other matter
214 or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir, I do not.

On her cross-examination, conducted by Mr. Heffner, the witness, Mrs. MANNING, testified as follows:

Q. Are you certain, Mrs. Manning, that the horse borrowed by Mrs. Mettler or Mr. Hunter from Emerson Powers on December 2nd, 1896, was a brown horse?

A. That is what he called him and what I called him; they called him "Old Brown," I don't know what else they called him.

Q. Can you state positively how many white feet this horse had?

A. I cannot.

Q. Can you state positively that he had any white about his face?

A. No, sir, I cannot.

Q. Was there or not any peculiarity about the shape of the horse's head?

A. I don't know; I was not familiar enough with the horse to know much about him; I know he was a big old rough horse they called "Old Brown."

Q. Can you state approximately about the height?

A. No, sir, I don't know anything about it.

Q. Describe as best you can, Mrs. Manning, the horse driven by Mrs. Mettler and Mr. Hunter to your house on December second, 1896?

A. I don't remember anything about it; I didn't even go outside where the horse was at all.

Q. Do you remember whether it was a large or small horse?

A. I don't, but I think it was a small horse; about all I remember is that it was a dark horse.

Q. Were Mr. Hunter and Mrs. Mettler together in the room
215 upstairs at the Emerson Powers house?

A. Yes, sir.

Q. How long did they remain together up in the room?

A. I don't know, but I should guess a couple of hours, if not more.

Q. What articles, if you remember, did Mrs. Mettler have stored in that room?

A. I don't know; I never knew anything about it.

Q. What articles, if you remember, did she take from the room on that occasion?

A. I don't remember, except some bedding.

Q. Do you know of your personal knowledge, that the Emerson Powers horse described by you in your direct examination was dead at the time you have stated the fact?

A. No, sir.

Q. Your information as to this fact is based solely upon hearsay?

A. Yes, sir.

M. H. MANNING.

I do further certify that the testimony so given by the witness Mrs. M. H. Manning was reduced to typewriting by me as the same

appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of both the counsel above-named; the genuine signature of the said witness appearing above.

Thereupon the plaintiff called as a witness J. A. WHITE, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by counsel and gave answers and testimony as follows:

Testimony of the Witness J. A. White.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?
216 A. J. A. White; residence, Pecos, Texas.
Q. Where were you living, Mr. White, in December, 1896?
A. Right down the street here.
Q. In what occupation were you engaged then?
A. Stock business.
Q. Are you in the same business now?
A. Yes, sir.
Q. Where is your ranch located?
A. About twenty-seven miles above here.
Q. Do you remember the occurrence of the disappearance from Pecos of William A. Hunter, and of his supposed drowning in December, 1896?
A. Yes, sir, I remember about the time.
Q. Please state whether on or about December 29th, 1896, you visited the supposed camp of W. A. Hunter on the east bank of the Pecos, a few miles above the rock crossing on the Pecos river?
A. Yes, sir, about that time I was invited to go up and investigate and see what had become of the gentleman.
Q. Who else was there on that occasion?
A. There was myself, my brother, Mr. Clark, Mr. Johnson, Mr. Gibson and some more kids from town here, I don't remember who, and Mrs. Mettler and Mrs. Johnson.
Q. Did you make an examination of the camp and its surroundings on that occasion?
A. Yes, sir, we trailed him down to where he is supposed to have gone after water, and back, and then we also trailed him where he went out from the camp and picked up wood to cook a little snack.
Q. Please state whether in the course of the search you had a conversation with Mr. Henry Slack in regard to the appearances at the camp and what they indicated?
A. After we had investigated everything around the camp and on the river and where he had gone and got water and wood, then the next proposition was to search the river bank and the bend and the

river surrounding there to see if we could see anything of
217 the other horse or anything to show what had become of the man.

Q. What, if any, conversation did you have with Mr. Slack?

A. After we examined everything around there as well as I remember, we had a lunch, and after that the proposition was to search around there the best we could; it was a very cold day; we divided up and started to ride out from the camp; Mr. Slack, my brother and myself was together; I hadn't been about home for nearly a month and there was not much interesting about there for me, and I made the remard to my brother and Mr. Slack that I thought we were fooling away our time, that from what I saw I thought the man had rode off or walked off, or something like that. Mr. Slack remarked "Are you not on?"

Mr. HEFFNER: Defendant-, by their attorney, objects to the last two preceding questions propounded to the witness White and to his answers thereto, upon the ground that the testimony is immaterial and incompetent. Also upon the further ground that the witness' answers are not responsive to the questions.

Q. What else did Mr. Slack say?

A. Mr. Slack said that his understanding was that Mr. Hunter had just a few days ago had his life insured in Dallas for ten or fifteen thousand dollars, not over twenty; something like that.

Defendants, by their attorney, objected to the last preceding question and the answer thereto upon the ground that it is immaterial and incompetent testimony.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I believe not.

Q. Please state whether at any time soon after this visit to Hunter's camp of which you speak, you had a conversation with
218 Mr. R. S. Johnson in regard to Hunter's disappearance? And if so, when you had such conversation?

A. Day or two after we come back, I met Mr. Johnson and had a conversation with him on that subject.

Q. What, if anything, did Mr. Johnson say to you in the course of this conversation on the subject of insurance?

A. I don't remember that there was anything said about the insurance with Mr. Johnson; the question was—how he drew my attention was this: After we had made our search around the camp, around through the brush we were all to meet back at the camp; we then decided we would take the bed *yp*; the bed had never been touched; Mr. Johnson and Mr. Gibson were undoing the bed and when he——

Q. I was not asking about the conversation out at the camp; I was asking about this conversation you had with Johnson after you came back to town?

A. That was what brought up the matter; Mr. Johnson asked me why I made such a remark. That was this: In taking up this bed, it was made right down on a sand bed, and just barely the print of the bedding was in the sand; I says, "No one never lay on that bed; if as big a man as he is laid down there the print would have been left there."

Q. In the conversation you had with Johnson a day or two after you made this visit to the camp, what did he say?

A. I don't remember, any more than he asked me my motive for saying that the man never slept on the bed.

Defendants, by their attorney, objected to the last four questions propounded to the witness White, and to the answers thereto, on the ground that said testimony is irrelevant, immaterial and incompetent, and upon the further ground that the answers are not responsive to the question as propounded.

The plaintiff confesses that the objections to all the questions and answers succeeding the general interrogatory are well
219 taken and withdraws the questions.

J. A. WHITE.

I do further certify that the testimony so given by the witness J. A. White was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties or counsel as were in attendance; the genuine signature of the said witness appearing above.

Thereupon, the plaintiff called as a witness W. B. OATES, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by said counsel and gave answers and testimony as follows:

Testimony of W. B. Oates.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence?

A. My name is W. B. Oates, age 44, residence thirty miles northeast of here at Johnson's ranch.

Q. Please state whether your business calls you frequently to Loving county, Texas, and to the vicinity of the former location of the town of Mentone?

A. It does.

Q. How long have you been acquainted with the country about Mentone?

A. I think about six years since I first went there; Mentone is in Johnson's ranch and I have been working there six years.

Q. About what was the population of Mentone and about what was the population of Loving county when you first went there six years ago?

A. There was no one at Mentone except one man who was working for Johnson.

220 Q. About what was the population of Loving county at that time?

A. Not more than three or four or five in Loving county at that time.

Q. Do you know about the attempt to construct an irrigation ditch at or near Mentone?

A. Yes, I know there was a ditch started up there.

Q. About when, if you know, was the attempt to construct an irrigation ditch there abandoned?

A. I don't know; I think it was in 1893 they commenced work there, 1893 or 1894.

Q. About how long did they continue working on it?

A. After I first knew of their working there they didn't work very long; they might have been at work sometime before I knew anything about it.

Q. What is the character of the soil about the former location of Mentone, as to its being suitable for agriculture?

A. I don't know; I am not much of a farmer; they farm on just such land, but they can't do it without irrigation.

Q. Do you know about what was the market value of land in that vicinity when you first became acquainted with that country, and if so, what was it?

A. No, sir, I do not.

Q. Where did you live and what was your occupation during December, 1896?

A. I was in the livery and grain business here in Pecos.

Q. Please state whether you were acquainted with Mrs. Jennie M. Mettler and her brother, William A. Hunter?

A. I was acquainted with Mrs. Mettler and saw Hunter, I think, twice.

Q. Please state whether about the last of November or first of December, 1896, you had at your stable, a horse supposed to belong to Mrs. Mettler?

A. Yes, sir.

Q. Whence did you get the horse?

221 A. Do you mean where or when?

Q. Whence?

A. The horse was sent in from Johnson's ranch.

Q. At whose request?

A. Johnson's.

Q. When?

A. Along about the last of November, I never had him there but a few days.

Q. What instructions, if any, did you receive, when the horse was brought to your stable, as to notifying any person that you had it?

A. I was instructed to notify Mrs. Mettler.

Q. What did you do about notifying Mrs. Mettler about the horse being there?

A. I sent her word that the horse was there.

Q. Please describe the horse as well as you can?

A. He was a brown horse.

Q. A large or small horse?

A. He was a medium size horse.

Q. About how many hands high?

A. I should think about fifteen or fifteen and a half hands high.

Q. What disposition did you make of the horse?

A. Mrs. Mettler and Mr. Hunter came and got it.

Q. Did they come together?

A. Yes, sir.

Q. After you gave the horse to Mrs. Mettler and Mr. Hunter, did you ever see it again, if so, when?

A. I would not be positive that I have; I saw them working two brown horses, and I think one of them was that horse.

Q. How long after you had let them have the horse was that?

A. I can't say just how long it was; I think it was on the third day of December that I saw them.

Q. Who was it you said had the span of horses at that time?

A. Mr. Hunter.

222 Q. Did you recognize the other horse?

A. No, sir.

Q. What sort of a vehicle did Hunter have with him on that occasion and what did he have with him?

A. I couldn't tell whether it was a two-horse wagon or a hack.

Q. Do you know about the contents of it?

A. He had some alfalfa hay—I sold him the hay—either two or three bales.

Q. Did he have anything in the nature of a camping outfit?

A. I don't remember.

Q. Did he tell you anything about where he was going or what he was going to do?

A. I don't know; I couldn't say.

Q. About how long was it after this, if ever, that you heard of Hunter's supposed drowning in the Pecos river?

A. It was several days; I don't know just how many.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir.

On his cross examination conducted by Mr. Heffner, the witness OATES testified as follows:

Q. Do you know, Mr. Oates, when Mr. Hunter left Pecos with reference to the time that the Mettler horse was taken from your stable?

A. It was only a few days; I don't know just exactly the amount of days.

Q. Do you know on what day William A. Hunter left Pecos city?

A. Yes, sir, he left here—the last I saw of him was on the third day of December, something like nine o'clock in the morning.

Q. Where did you see him at that time?

223 A. I saw him at the grain house.

Q. Did he have his wagon and team with him?

A. Yes, sir, had a wagon and team or a hack and team, I don't remember which.

Q. Do you know where the rock crossing is located on the Pecos river?

A. Yes, sir.

Q. Is it, or not, a noted camping place?

A. I don't think it is.

Q. Are there any noted camping places on the Pecos river either above or below the rocky crossing?

A. There is only one place the river comes out close to the road, there is more camping done there than at any other place.

Q. Where is that place located with reference to the rocky crossing?

A. It is six or seven miles above there.

Q. About how long would be required in driving a loaded wagon drawn by two horses from Pecos city by way of the Pecos River bridge to the rocky crossing?

A. It is owing to how you go; there are times that you can't go up through the farm.

Q. We are talking about that time?

A. I do not know.

Q. Is it not something like a half day's drive from Pecos to the rocky crossing?

A. I should think it would be something like a half day's drive from Pecos to the rocky crossing, with a loaded wagon.

Q. Did you ever go to the place on the Pecos river where Hunter's camp was found?

A. Yes, sir, where it is said it was found.

Q. Did you visit that place before or after the wagon and camp outfit was removed?

A. I have been there before and since.

W. B. OATES.

224 I do further certify that the testimony so given by the said witness W. B. Oates was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the

said witness and was signed by the said witness in my presence and in that of such of the parties and counsel as were in attendance; the genuine signature of the said witness appearing above.

Thereupon the plaintiff called as a witness R. D. GAGE, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness R. D. Gage.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?
A. R. D. Gage; Pecos, Texas.
Q. What is your occupation?
A. Banker.
Q. How long has it been such?
A. I have been interested in the bank since 1891; in the active management of it since 1896.
Q. In what other business or profession were you formerly engaged and for how long?
A. In the practice of the law, for about twenty years.
Q. What was your occupation in January, 1897? And December, 1896?
A. I was both in the law and the banking business, in Pecos.
Q. In the year 1896, and prior to that year, were you acquainted with William A. Hunter?
A. Yes, sir, slightly so.
Q. When did you form his acquaintence and where and how long did you know him and about how often did you see him?
A. My recollection is that I met him first sometime in the year 1893, soon after the organization of Loving county. I don't
225 suppose I met him more than half a dozen times between that date and my meeting with him in December, 1896.
Q. Please state whether Mr. Hunter was ever a client of yours or a customer of your bank during your management of the bank?
A. He was not a client of mine, and my recollection is that he may have had some transactions with the bank at various times.
Q. Please state if you know, what connection, if any, William A. Hunter had with the attempt to construct an irrigating ditch on the east side of the Pecos river near Mentone, in Loving county.
A. He was generally reputed to be connected with the enterprise.
Q. Do you know what became of the attempt to construct that ditch, and if so, what?
A. It fell through; it was a failure.
Q. When was the attempt abandoned, about?

A. I think the latter part of 1893, or 1894; I don't remember exactly.

Q. That is the abandonment?

A. Yes, sir.

Q. Do you remember about the organization of Loving county?

A. Yes, sir.

Q. About when was that organization had?

A. That was about the middle of 1893, is my recollection.

Q. At the time of the organization about what was the population of Loving county and how was it made up?

A. I can only speak from general reputation; I was never in the county in my life; there were very few ranches scattered through the county; it was extremely sparse population, and it was generally believed that the petitioners for the organization were the employés of the company.

Q. The irrigation ditch company?

A. Yes, sir.

Q. When the attempt to construct that ditch was abandoned, what became of the population of Loving county?

A. They ceased to be—everybody left.

226 Q. The county became depopulated?

A. Yes, sir.

Q. What was the condition of the county with reference to its being populated or depopulated in December, 1896?

A. I don't suppose there were a dozen people living within the boundary of the county at that time.

Q. I believe you stated a few moments ago that you saw William A. Hunter in December, 1896?

A. Yes, sir.

Q. About what time in the month was that?

A. It was the very early part, possibly the second, or third or fourth.

Q. Please state where you saw him and recount as fully as you can the circumstances of your interview and what took place, what was said and what was done by both parties?

A. He came to my office in the bank and said that he was on his way up to his section of land near Mentone, in Loving county; that his three years' occupancy of it was about complete and that he wished to live out on the land the few remaining weeks; he had with him a package of papers which he asked me to deposit in the bank vault and keep safely for him. That was about all of the conversation; he left in a few minutes and I never saw him from that day until sometime in April of the present year, when I saw him in the court-room in Dallas, Texas.

Q. Please state whether the package of papers he asked you to place in the vault for him was sealed?

A. It was.

Q. Was it addressed in any way?

A. My recollection is his name was upon the back of the package.

Q. Did you place it in the vault for him?

A. I did.

Q. What request, if any, did he make with reference to your notifying any other person of the existence of that package or its whereabouts?

227 A. None.

Q. Simply handed it to you and asked you to put it in the vault?

A. Yes sir.

Q. Please state whether at that time he had an account with the bank?

A. No sir, he did not.

Q. Had he had one recently?

A. No sir, in fact, he had been absent from the country for several years.

Q. Please state whether at that time he made with you any deposit of money?

A. No, sir.

Q. The only transaction was to leave the package of papers?

A. Yes, sir.

Q. You stated a moment ago, from that time on you never saw him until April of the present year, when you saw him in the court room at Dallas; did you have any conversation with him at that time?

A. Yes, sir, a very casual and short conversation.

Q. Will you relate the circumstances of that conversation?

A. I was standing in the court room chatting with Mr. Gibson and several other parties, who, like myself, had been summoned as witnesses in the case then on trial in which Mr. Hunter was defendant, and I asked if Mr. Hunter was there, and some one in the crowd, I think Mr. Gibson, remarked, "Yes, yonder he comes now, out of the room." I turned and saw him come into the court room out of a small room, and some one made the remark to see whether or not he would recognize me or I recognize him and I advanced towards him crossing the court room and when in some four or five feet of him he called me by name. We shook hands and he began to ask questions about the condition of the Pecos valley and especially as to the value of lands located therein.

Q. Please state whether he said anything with reference to the trial then pending?

A. No, sir, he made no remark concerning the trial.

228 Q. What was his manner as to calmness and self possession?

A. He seemed to be very self-possessed, very calm and quiet in his manner. The nearest approach to anything concerning the trial then pending was with reference to a question of mine as to whether Mrs. Mettler was in Dallas, and his reply was that he really didn't know, that he had not seen her.

Q. Were you acquainted with Mrs. Mettler—Mrs. Jennie M. Mettler—during 1896?

A. Yes, and for two or three years prior thereto.

Q. What was her financial condition in the latter part of December, 1896?

A. During the entire time that I knew her, she was generally supposed to be in very straitened circumstances.

Q. Please state whether at any time in December, 1896, you had an interview with Mrs. Mettler?

A. Yes, sir, I did.

Q. Please recount the circumstances and substance of that conversation, of your first interview?

A. She came to the office just after Christmas, I can't place the exact date, and said she wanted some advice with reference to looking after her brother, that he had left town in the early part of December to complete his occupancy of a section of land near Mentone, he had left promising to return and spend the Christmas holidays with her, and that he hadn't returned and that she had become somewhat apprehensive as to his safety; she didn't use that word, but that was the substance of it. I told her I would employ some cow boy to ride out there and see what was the matter, and she said she had already done that; she had gotten Mr. Henry Slack to go out and he had returned and reported his failure to find him. I then suggested that she should see Judge Heffner, the county judge and the sheriff and have a thorough search instituted. She left the office signifying her intention to act on this suggestion. That was substantially all that took place at that time.

Q. When did you next have an interview with Mrs. Mettler?

A. It was possibly after the lapse of a week or ten days.

229 Q. Please relate what took place at that time, and the circumstances attending that interview?

A. She then came in and had some papers of some kind; my recollection is that one of the papers concerned an indebtedness or claim of some sort in Ohio, and possibly some other papers she had with her at the time; I gave her some little advice concerning it; I don't remember what it was now.

Q. Did she at that time have with her a note against any one?

A. I think possibly she did have a note.

Q. In whose favor? Was the note in Hunter's favor?

A. I think the note was in Hunter's favor.

Q. What, if anything, was said and done between you and her in regard to that note?

A. My recollection is that note had an endorsement; she was anxious to collect it, and I suggested if she would endorse it with his name and her name, we would undertake the collection of it for her.

Q. Was that done?

A. Yes, sir.

Q. What was the result of that attempt to collect the note?

A. The note was finally collected.

Q. And the money paid over to her?

A. Yes, sir.

Q. What further conversation did you have with her at that time?

A. About the close of the conversation I told her of the circumstance of Mr. Hunter having left a package for safe-keeping in our vault. I got the package and started to hand it to her, when she requested me to open it myself, assigning as a reason that she had on gloves; she held up her hands, woman-like, and says "I have got on my gloves."

Q. Did you open it?

A. Yes, sir.

Q. What did you find in the package?

A. The three insurance policies, several papers—Loving
230 County script, county warrants they are generally called; I believe a note of some kind and possibly one or two other papers.

Q. What was done with the contents of the package after you and Mrs. Mettler had inspected the package?

A. She requested me to re-deposit them in the vault.

Q. You retained them in your possession?

A. Yes, sir.

Q. What, if anything, was done at that time with reference to the insurance policies—notifying the company?

A. My recollection is she requested me to notify the company.

Q. Do you remember just what you did in response to that request?

A. I think I wrote a letter to them requesting blank proofs.

Q. Do you remember whether you wrote the letter to the company yourself, in your name, or whether you drafted a letter for her to copy and send in her own name?

A. I don't remember exactly, but I believe I drafted a copy for her to write and send; that is my best recollection.

Q. Your recollection of the contents of that letter that you drafted for her, or possibly wrote yourself, is that it was a notice to the company of the death of Hunter, or a request for proof blanks?

A. Yes, sir, I can't say whether I made use of the word "death" or "disappearance;" I don't know whether I apprised them of the existing state of facts or not.

Q. What was her manner at that time, with reference to indicating the existence or non-existence of previous knowledge on her part of the fact that her brother's life was insured in her favor?

A. She said that her brother had mentionad to her something about an intention to take out a policy in her favor, but that she had not been apprised of the fact whether or not he had carried that intention into execution.

Q. Did she, or not, before your mentioning the fact that there was

a package of papers in your vault belonging to her brother,
231 make any mention of the possible existence of such package or the existence or possible existence of any insurance on his life?

A. No, sir.

Q. Do you remember about how long it was after the discovery of Hunter's camp on the river that Mrs. Mettler called to see you with reference to the note and other matters?

A. I think it was a week or ten days, possibly two weeks.

Q. Did you see her at any time and have any conversation with her between the visit that occurred directly after Christmas before the discovery of Hunter's camp and this second visit you described?

A. No, sir.

Q. There were only two interviews up to that time?

A. Yes, up to that time; she was in there subsequently.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir, I do not.

On cross-examination by Mr. Heffner, the witness testified as follows:

Q. What, if anything, Mr. Gage, did you have to do with the organization of Loving county?

A. Mr. Walthall, who was my partner, and myself were employed to appear before the commissioners' court of Reeves county and represent the petitioners in the matter.

Q. Did you ever see the petition to the commissioners' court of this county for the organization of Loving county?

A. I presume so, I don't retain any recollection of its contents.

Q. Was that petition presented by you and Mr. Walthall for its action?

A. By one or both, I don't remember which.

232 Q. What action did the commissioners' court take on that petition?

A. My recollection is the matter was open for several days before the court acted; the petition was finally granted.

Q. Did the organization of Loving county take place after that time?

A. Yes, sir.

Q. Was there any investigation on the part of the commissioners' court at that time as to the sufficiency of the petition for organization?

A. I think possibly the delay was occasioned by some such action on the part of the court.

Q. It was finally accepted and acted on by the court.

A. Yes, sir.

Q. Did Mrs. Mettler, or not, tell you in either of these interviews about which you have testified that she herself had employed Mr. Slack to go to Mentone, or Loving county for the purpose of looking after her brother?

A. I don't remember that the word "employment" was used; when I suggested that she procure the services of some cow boy to ride up there and make an investigation, she said Mr. Slack had already acted in that way, and had returned reporting his failure.

Q. Do you remember whether or not she said in that interview that she herself had employed anybody to render her this service?

A. Nothing further than I have just stated.

Q. You have stated that in another interview which you had with Mrs. Mettler prior to the time that you advised her that her brother William A. Hunter had left a package in the bank vault, that she had never referred to the fact that Hunter had secured a life policy in her favor?

A. No, sir, no intimation that she knew of the existence of the package of papers.

Q. Then, so far as you know, that was the first she knew that he had a policy on his life?

233 A. That is true as far as I know.

Q. Did you ever receive a reply to the letter that you or Mrs. Mettler wrote to the insurance company?

A. I don't remember clearly, but I think a reply was received.

Q. Do you know whether or not the proofs written for were supplied or furnished?

A. I don't remember whether they were or not.

Q. Did you have anything yourself to do with the preparation of the proofs?

A. I think not, I don't think I did.

Redirect examination by Mr. LOCKE:

Q. Was Loving county an organized county in December, 1896 or had it at that time been disorganized?

A. My recollection is it was still an organized county and that the act of disorganization of the county was passed by the legislature which convened in January, 1897.

R. D. GAGE.

I do further certify that the testimony so given by the said witness R. D. Gage was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties or counsel as were in attendance; the genuine signature of the said witness appearing above.

Thereupon the plaintiff called as a witness J. W. PREWIT, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by said counsel and gave answers and testimony as follows:

Testimony of the Witness J. W. Prewit.

Direct examination by Mr. LOCKE:

234 Q. Please state your name, age and place of residence?
A. J. W. Prewit, 66 years; residence, Pecos, Reeves county, Texas.
Q. What occupation are you engaged in?
A. In the ranch business.
Q. How long have you been engaged in such business?
A. About twelve years.
Q. Where is your ranch?
A. Fifteen miles south of Pecos, now.
Q. Where was your ranch in December, 1896?
A. Same place.
Q. Please state whether you ever had a ranch on the west bank of the Pecos river, about twelve miles north of Pecos city?
A. I did.
Q. In what years did you have that ranch?
A. In 1891 and 1892, as well as I remember.
Q. Please state whether about the first of December, 1896, you were acquainted with Jennie M. Mettler?
A. Yes, sir, I remember her.
Q. Do you remember the occurrence of the disappearance of William A. Hunter, in December, 1896, and his supposed drowning?
A. Yes, sir.
Q. Please state whether you saw Mr. Hunter on the day he left Pecos city?
A. Yes, sir.
Q. How many times did you see him that day?
A. I don't remember seeing positively but one time; I am not positive whether I saw him the second time or not. I am under the impression I saw him twice.
Q. Please state where, and at what time of the day you first saw William A. Hunter on the day he left Pecos?
A. If I remember, it was nine or ten o'clock in the morning out here at the Heitman place, the place where Mr. Slack now lives.
Q. Who, if any one, was with him at that time?
235 A. Mrs. Mettler and he were together.
Q. Where were they with reference to the Heitman house?
A. They were west of the Heitman house, just on the outside of the yard.
Q. Please state whether there was a team or vehicle of any kind with them at that time and place?

A. They were standing right in front of a pair of horses hitched to a wagon.

Q. Were you acquainted with either of those horses?

A. Yes, sir.

Q. Please identify and describe the horse with which you were acquainted.

A. Some call him a brown horse, and some a dark bay; I called him a dark bay; I should think he was about fifteen hands high, and about eleven years old.

Q. What, if anything, do you remember about the marking of his feet?

A. I don't remember any special marks about his feet; I knew the horse very well.

Q. How long had you been acquainted with the horse?

A. I had kept him about twelve months up there in the pasture, and rode him; I rode him to town here a number of times. I kept him up there in the pasture.

Q. In which pasture?

A. Up twelve miles north of Pecos on the west side of the river, right on the bank.

Q. Do you know from hearsay or otherwise, where the camp of W. A. Hunter was found on the Pecos river?

A. Yes, sir, from hearsay.

Q. Where was that camp with reference to your pasture?

A. Right on the east bank of the river at the east boundary of my pasture; the river was the line, the east line of my pasture.

Q. Hunter's camp was just across the river from your pasture?

A. Yes, sir.

236 Q. To whom did the horse that you have described belong in December, 1896?

A. If I understand it right, I understood it to belong to Emerson Powers.

Q. Were you acquainted with the habits and characteristics of that horse as to its being a good ranch horse?

A. Yes, sir.

Q. What was it?

A. He was a good ranch horse.

Q. Was he, or not, a horse accustomed to camp life?

A. Yes, sir.

Q. Please state whether horses of the training and experience in camp life which the Powers horses had, usually stay about a camp when turned loose for the night, or whether they stay away?

A. Not in all cases. Some horses will stay and some will stray away.

Q. What, if you know, was the habit of the Powers horse in this direction?

A. He was satisfied at camp or in a pasture; never had any trouble with him whatever.

Q. Did you know the other horse that Hunter had?

A. I did not.

Q. Please state if you noticed about what were the contents of the wagon that Hunter had when you noticed him that morning?

A. As well as I remember, it looked like he had one or two bales of hay, looked like a camp outfit.

Q. If you know the history of the Powers horse from the time you had him in the early nineties, until December, 1896, please state where he was kept during that time?

A. My recollection is after he left me he went down to Grand Falls; then I think I saw him afterwards here, and the next time I saw him he was hitched to the wagon up there.

237 Q. Please state whether, so far as you know, that horse ever had been kept at or near Barstow.

A. Never that I ever heard of.

Q. I believe you stated a few minutes ago that you thought you saw Hunter a second time on the day that he left Pecos. Where was it you saw him?

A. I think it was right on that street there, right in front of the postoffice.

Q. What was he doing at that time?

A. He was stopped there as if he was getting some goods, or seeing about some goods, or he may have been in the postoffice.

Q. Please state whether he had with him the same team you had seen him with previously?

A. Yes, sir, he had the same team.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir, I don't know anything else.

On his cross examination by Mr. Heffner, the witness testified as follows:

Q. Can you, or not, describe any more particularly, the horse of Powers than you have already described?

A. No, sir, I cannot.

Q. Was the horse that you have described as the Baylor or Powers horse one and the same animal?

A. Yes, sir.

Q. Do you now remember that this particular horse had one or more white feet?

A. No, sir, I couldn't say to save my life.

Q. Can you now say if he had any white about his face?

238 A. I can't say positively that he had any white in his face, but my impression is that he did.

Q. Was there any peculiarity about the shape of his head?

A. Yes, he was rather a peculiarly shaped horse.

Q. What was the peculiarity about the shape of his head?

A. He had a tolerably large head.

Q. Any other peculiarity about the shape of his head?

A. No, sir.

Q. Can you describe any more definitely than you have already described, the contents of Hunter's wagon at the time you saw it near the Heightman residence?

A. No, sir.

Q. Did you ever see the Baylor or Powers horse after you saw him hitched to Hunter's wagon on that day?

A. No, sir.

Q. Do you know of your personal knowledge what became of that horse?

A. No sir.

Q. Was there any reason or reasons rendering the locality on the Pecos river where Hunter was supposed to have camped, particularly objectionable as a camping place?

A. No, sir.

Q. Were there at that time, Mr. Prewit, any noted camping places on the Pecos river between the town of Pecos and Mentone?

A. I couldn't tell you that.

Redirect examination by Mr. LOCKE:

Q. Are you acquainted with the position of the Hunter camp with reference to the Mentone road, and with reference to the character of ground between the camp and the road? If so, describe the same?

A. It seems to me the road would be some distance east of the camp.

Q. Do you remember the character of the country between the camp and the Mentone road with reference to its being open or timber?

239 A. It is heavy mesquite brush, is my recollection.

J. W. PREWIT.

I do further certify that the testimony so given by the said witness J. W. Prewit was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of both counsel above named: the genuine signature of said witness appearing above.

Thereupon the plaintiff called as a witness Mrs. R. S. JOHNSON, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness Mrs. R. S. Johnson.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?
A. Mrs. R. S. Johnson; residence, Pecos, Texas.
Q. What is your husband named?
A. R. S. Johnson.
Q. Please state whether in the fall of 1896 you knew Mrs. Jennie M. Mettler?
A. Yes, sir.
Q. What was the nature and extent of your acquaintance with her at that time?
A. She stayed at my house quite a good deal.
Q. Please state whether during the fall of 1896, Mrs. Mettler did any kind of work for you; if so, what?
A. She didn't do any work for me.
Q. What was her occupation at that time?
A. Nothing that I know of, just staying around.
240 Q. Did she do any sewing during the fall?
A. Yes, she did dress-making; that is, after she left my house.
Q. About the month of December, 1896, where was she living?
A. She was with Mrs. Heitman.
Q. About how far was it from your home to the home of Mrs. Heitman, where Mrs. Mettler had been staying?
A. Just across the street.
Q. If you remember, please state where else Mrs. Mettler had been living before she went to live with Mrs. Heitman?
A. Before she come to my house she had been at Mrs. Powers'.
Q. Please state whether you remember the circumstance of William A. Hunter disappearing from Pecos in the month of December, 1896, and of his supposed drowning?
A. Yes, sir, I remember it.
Q. Did you ever meet William A. Hunter?
A. Yes, sir.
Q. Who introduced him to you?
A. Mrs. Mettler.
Q. What relationship, if any, did she say existed between them?
A. They were brother and sister.
Q. About how long was it before Hunter disappeared that you met him?
A. Just a day or two.

Q. Do you remember about how long he was here on that trip?
A. He was here about a week, I think.
Q. What, if anything, did Mrs. Mettler say to you about that time with reference to where Mr. Hunter was going or what he was going to do?
A. She said he was going up to Mentone to live out the claim.
Q. Please state whether before the time of Mr. Hunter's visit to Pecos about the first of December, 1896, you ever had a conversation with Mrs. Mettler in regard to any insurance on Mr. Hunter's life?
A. Yes, we talked about it once.
Q. Do you remember about how long that was before Hunter came out here?
241 A. I can't remember.
Q. Please fix as nearly as you can the time of that conversation?
A. I think it was about October some time.
Q. What did Mrs. Mettler say on that subject?
A. She said Will had his life insured in her favor.
Q. Whom did she mean by Will?
A. Mr. Hunter.
Q. Do you remember whether you ever mentioned to your husband before the time of the finding of Hunter's camp what Mrs. Mettler had said to you about this insurance?
A. Yes, I think we talked about it.
Q. Please state whether you ever had a second conversation with Mrs. Mettler about the insurance on her brother's life in her favor?
A. We did after he disappeared.
Q. At about what time of the day did you have this second conversation?
A. It was about noon, just before dinner.
Q. Please state if you know, how Mrs. Mettler was in the habit of receiving her mail in December, 1896, and January, 1897?
A. She got it in our box.
Q. Do you remember any special piece of mail that Mrs. Mettler received in the early part of January, 1897, and if so, what was that?
A. Mr. Johnson got a registry receipt out of the box one Sunday morning.
Q. When was it Mr. Johnson delivered that registry receipt with reference to the time of your second conversation with Mrs. Mettler concerning the insurance on her brother's life?
A. It was not but an hour or so after the conversation; just a little while.
Q. What did Mr. Johnson do with the registry receipt?
A. He gave it to her.
Q. At your house?
A. Yes, sir.

242 Q. Was it before or after the conversation that you had with Mrs. Mettler about the insurance that he gave it to her?

A. It was after.

Q. When he came home to dinner?

A. Yes, sir.

Q. Now, please state what it was that Mrs. Mettler had said to you in that conversation with regard to insurance on her brother's life?

A. She said she didn't know what company he was insured in. I asked her what company he was insured in and she said she didn't know.

Q. What, if anything, did she say about knowing where the policies were?

A. Said she didn't know where they were.

Q. Please state whether you ever visited the camp on the east bank of the Pecos river where Hunter's wagon was found?

A. Yes, I went up there with Mrs. Mettler.

Q. Who else was there at that time besides yourself and Mrs. Mettler?

A. Mr. Johnson was there and Mr. Avery and a number of others, I don't remember them all.

Q. What, if anything, did Mrs. Mettler say on that occasion in regard to the ownership of the horse that was found dead at the camp?

A. She said it was hers.

Q. What, if anything, did she say to you about the other horse, that Hunter had taken with him?

A. I don't remember.

Q. What, if anything, did Mrs. Mettler say to you at or about the time of Hunter's going to Mentone as to what she intended to do?

Q. He was to go up there and fix a little house and come back for her.

Q. Then she was to go up there and live with him?

A. Yes, sir.

Q. What was her statement as to whether he was going to construct that house on this trip?

A. Yes, he was to fix some kind of place for her to stay and then he was coming back for her.

243 Q. What was Mrs. Mettler's conduct at the camp at the time you and she were there together with reference to showing any grief?

A. She didn't show any grief at all.

Q. What was the habit of Mrs. Mettler during the month of December and during the time that elapsed after her brother had left here before the camp was found, with reference to talking with you about the matter, sending word by you to your husband?

A. She often spoke of wanting Mr. Johnson to send some one up the river to hunt for him, and wished he would.

Q. Mr. Johnson was at his place of business during the day?

A. Yes, sir.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir, I don't know anything.

On her cross-examination by Mr. Heffner, the witness Mrs. Johnson, testified as follows:

Q. Do you remember, Mrs. Johnson, that Mrs. Mettler ever at any time said anything to you with reference to a policy on the life of William A. Hunter, prior to the time that the registry receipt was delivered to her by Mr. Johnson?

A. Yes, she talked to me that morning about the policy, before the registry receipt was brought to her.

Q. Was that the first time that Mrs. Mettler had mentioned to you the fact that Mr. Hunter had a policy on his life?

A. Once before that she said he had.

Q. When, then, was the first time that Mrs. Mettler told you that W. A. Hunter had a policy on his life?

A. I think it was in October sometime.

Q. Where was Mrs. Mettler living at that time, in October?

244 A. She was staying with me then.

Q. Did she in any of those conversations state the amount of the policy of insurance?

A. She never did.

Q. Dis she in any conversation state to you that she was the beneficiary named in the policy?

A. Yes, sir, that it was in her favor.

MRS. R. S. JOHNSON.

I do further certify that the testimony given by the said witness Mrs. R. S. Johnson, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of both counsel above-named; the genuine signature of said witness appearing above.

I do further certify that the depositions of the various witnesses above named as the same are hereinbefore contained, were retained by me in my possession until this moment, and that I am now sealing the same and addressing them for transmission by mail to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony of all of which I hereunto set my hand at Fort Worth, Texas, on this the 12 day of September, A. D. 1904.

GEO. W. PARKER,
Special Examiner.

Fees paid to Witnesses by the Plaintiff, The Fidelity Mutual Life Insurance Company, in Addition to the Amounts Paid by the Marshal.

R. S. Johnson	balance fee,	2	days	.....	$2.00
Mrs. R. S. Johnson	" "	1	"	.....	.50
J. B. Gibson	" "	2	"	.....	2.00
R. D. Gage	" "	2	"	.....	2.00
W. B. Oakes	" "	2	"	.....	2.00
245 W. B. Oakes, mileage				.....	3.00
J. A. White	balance fee	2	days & m	.....	2.30
Pat Carson	" "	2	"	.....	3.00
Pat Carson, mileage				.....	4.50
					$19.30

My fee for taking the above depositions is..... 72.30

GEO. W. PARKER,
Special Examiner.

Indorsed as follows: 597 Eq. Filed Dec. 24, 1904; J. H. Finks, clerk.

246 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, WILLIAM H. CLARK, CHARLES A. CULBERSON, MORRIS A. SPOONTS, and PHILLIPS INVESTMENT Company, Defendants. } In Equity. No. 597.

I, Hartwell Nowell, who was specially appointed an examiner in the above styled cause, by order of the court made August 12, 1904, do hereby certify that at nine o'clock in the forenoon of Friday, September 2, 1904, at my office in Douglas, Cochise county, Arizona, I was attended by Mr. Maurice E. Locke, counsel for the plaintiff, for the purpose of examining witnesses orally, in accordance with the provisions of the sixty-seventh rule in equity and other relevant rules and statutes, and in pursuance of said order. I do further certify that no appearance was entered in behalf of the defendants or any of them.

Thereupon the plaintiff called as a witness A. D. IRVIN, who, having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth, in said cause, was questioned orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness A. D. Irvin.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence?

247 A. A. D. Irvin; 65 years of age; Douglas, Arizona.

Q. Please state if you ever resided in Pecos city, Texas, and if you did, state what, if any, official position you held while residing there?

A. Yes, I resided in Pecos city, Texas; I was sheriff and supervisor of that county.

Q. When was that?

A. I lived there from 1883 to 1891.

Q. Did you ever live at Barstow, Texas?

A. Yes, sir.

Q. When?

A. I lived there from 1893 to 1899.

Q. How far is Barstow from Pecos?

A. Seven miles.

Q. In what direction?

A. East of Pecos.

Q. On what railway, if any, are Barstow and Pecos situated?

A. Texas & Pacific.

Q. How many passenger trains each way were accustomed to pass through Barstow daily in December, 1896?

A. One each way.

Q. At about what time did the east-bound passenger train pass Barstow?

A. I think it was about twelve o'clock at night.

Q. About how many inhabitants had Barstow in December, 1896?

A. About two hundred.

Q. Please state about how frequently you visited Pecos during the years 1895 and 1896 while you were living at Barstow?

A. Frequently; sometimes two or three times a week and sometimes two or three weeks without a visit.

Q. Please state whether, during those years, you were acquainted with Emerson Powers of Pecos?

248 A. Yes, sir.

Q. Please state whether prior to December, 1896, you were acquainted with a large brown or dark bay horse which Emerson Powers used to drive about 1895 and 1896, and if you were please state when and where you knew the horse and describe him as well as you can from memory?

A. Yes, sir, I seen him drive the horse at Pecos and I also seen him with him at Barstow. He was a large dark bay horse with a small white streak in the face, he was Roman-nosed, and about ten or twelve years old.

Q. Please state whether the horse ever lived at Barstow?

A. I do not think so.

Q. Please state whether you saw the above mentioned Powers horse at any time in December, 1896?

A. Yes, sir, I saw the horse in December, 1896.

Q. Please state when and where you saw the Powers horse for the first time in December, 1896, and describe the circumstances under which you saw him?

A. I saw the Powers horse on the 4th day of December, 1896, in the morning; he was standing near Mr. Ed Brady's lot when I first saw him.

Q. How far was that from the Texas & Pacific depot?

A. I think it was some one hundred or one hundred and fifty yards.

Q. Please state whether this Powers horse was loose or tied when you first saw him on December 4th, 1896, and state what, if anything, he had on in the way of harness or other accoutrement?

A. He was loose when I saw him; he had a piece of rope about nine or ten feet long tied to his neck.

Q. Please describe that rope with reference to its being clean or dirty, worn or otherwise, and knotted or broken at the loose end?

A. It was a three-quarter rope; it seemed to be compara-
249 tively clean and had a knot in one end of it, the end that was dragging; it did not seem to be worn.

Q. In what business were you engaged at that time?

A. I was a farmer and stock raiser.

Q. Please state whether at that time you were familiar with the use of such ropes as the one you found on the Powers horse, and familiar with the appearance of such ropes when subjected to the various uses to which ropes are put on farms and ranches?

A. Yes, sir, I was then familiar with the use of such ropes; I have used ropes since I was a boy.

Q. Please state whether, in your opinion, the rope which you found on the Powers horse on the morning of December 4th, 1896, had been dragged on the ground for a considerable distance?

A. The rope did not appear to have been dragged for any distance.

Q. Please state what, if anything, occurred about that time and what has occurred since that time to impress upon your memory the circumstances of your seeing the Powers horse at various times in December, 1896, and to fix the date on which you saw him for the first time in that month?

A. On the next morning after seeing the horse for the first time my son and grand-son and I went down the river about nine miles, I going to feed some hogs and they going to shoot ducks. While

there, my son remarked that he had camped on that spot just one year before, on the 5th of December, 1895, and told about the coyotes coming around the camp. After returning home I saw the horse several times. About a month or six weeks afterwards a Mr. Milliken came to Barstow and inquired of me about the horse and the rope. After that, I testified on this subject in the suit of Mrs. Mettler against the insurance company, and still later I testified on this subject in the trial of William A. Hunter, at Dallas, Texas, when he was charged with swindling the insurance company.

250 Q. When did you see the Powers horse for the second time in December, 1896, and where and under what circumstances did you see him?

A. I saw him on the morning of the 5th of December, 1896, at my place.

Q. When and where did you next see him?

A. After coming back on the 6th after feeding the hogs he was still at my place.

Q. When and where did you next see him, and what happened?

A. He was still at my place on the morning of the 7th and I led him down the canal about half a mile south.

Q. What became of the rope?

A. I took it off the horse and took it home.

Q. When and where did you next see the horse and what happened then?

A. I next saw him that evening near the place where I had left him; he appeared to be sick and I bled him in the mouth.

Q. When and where did you next see the Powers horse and in what condition was he then?

A. Next time I saw him he was about one-half or three-quarters of a mile east of where I had last seen him and he was dead; this was a few days after I bled him.

Q. Do you know or can you set forth, any other matter or thing which may be a benefit, or advantage, to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No.

There was no cross-examination.

A. D. IRVIN.

I do further certify that the testimony so given by the said witness, A. D. Irvin, was reduced to typewriting by me, as the
251 same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of said witness appearing above.

Thereupon, it appearing from the statement of the witness A. D. Irvin, that his daughter, Miss Lula Irvin, whom the plaintiff wished to call as a witness, was at his home and confined to her bed by an

attack of fever but able to give her testimony in her room, I adjourned the examination of witnesses to be resumed at 11 o'clock in the forenoon of this the 2nd day of September, 1904, at the residence of the said Irvin, in Douglas, Cochise county, Arizona, such time and place being reasonably necessary and convenient.

Thereupon the plaintiff called as a witness Miss LULA IRVIN, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony, as follows:

Testimony of the Witness Miss Lula Irvin.

Direct examination by Mr. LOCKE:

—. Please state your name, age and place of residence?

A. Lula Irvin; age 26; I reside at Douglas, Arizona.

Q. What relationship, if any, do you bear to A. D. Irvin?

A. Daughter.

Q. Please state whether you lived with your father during all the time that he resided at Pecos, Texas, and at Barstow, Texas?

A. Yes, sir.

Q. Please state whether at any time in December, 1896, you saw a large brown or dark bay horse which Emerson Powers of Pecos used to drive about 1895 and 1896?

252 A. Yes, sir, I did.

Q. If you can, please describe that horse.

A. He was a dark brown or bay horse and had the appearance of being an old horse. He had some white in the forehead.

Q. Please state when and where you saw this Powers horse for the first time in December, 1896?

A. The first time I saw him was at Mrs. Brady's in Barstow, Texas; it seems to me it was in the afternoon; it was on the 4th of December, 1896.

Q. Was the horse loose or tied when you first saw him?

A. He was loose.

Q. What, if anything, did the horse have on in the way of harness or other accouterment?

A. He had a piece of rope around his neck.

Q. What, if anything, occurred at about that time which afterwards enabled you to fix the date on which you first saw this Powers horse, in December, 1896?

A. I was getting some medicine at Pat Carson's drugstore in Barstow, on the next day after seeing the horse.

Q. What kind of medicine was it that you got?

A. Hall's catarrh cure.

Q. Did you pay cash for the medicine or have it charged?

A. I had it charged.

Q. To whom did you have it charged?

A. R. H. Keese, my brother-in-law.

Q. Please state whether you saw the Powers horse at any other time after December 4th, 1896, and if so, state when and where you saw the *the* horse?

A. I saw him around Barstow for three or four days following December 4th, 1896.

Q. What then became of the horse?

A. Papa led him away and he died down the canal.

253 Q. What has occurred, if anything, since that time to keep these matters fresh in your memory?

A. Mrs. Mettler suing the insurance company, and Mr. Hunter being tried and my testifying in both cases.

Q. Where are you giving your deposition?

A. In my sick room in my father's house.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No.

There was no cross-examination.

LULA IRVIN.

I do further certify, that in pursuance of the adjournment of the examination of witnesses above mentioned, such examination was resumed at the time and place appointed, I do further certify, that the testimony so given by the said witness, Miss Lula Irvin, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above mentioned, the genuine signature of said witness appearing above.

I do further certify that I have continuously retained the depositions of the witnesses before named in my possession until this moment, and that I am now sealing the same and addressing the same for transmission by mail to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony of all of which I have hereunto set my hand at Douglas, Cochise county, Arizona, this the 2nd day of Septem-

254 ber, A. D. 1904.

HARTWELL NOWELL,
Special Examiner.

Fees.

Witnesses, 2 at 1.50 each	$3.00
Examiner's	5.00
Total	$8.00

Above fees paid in full by Maurice E. Locke, attorney for plaintiff. September 2nd, 1904.

HARTWELL NOWELL,
Special Examiner.

255 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, v. JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity. No. 597.

I, Geo. W. Parker, who was specially appointed an examiner in the above styled cause by order of the court made August 8th, 1904, do hereby certify that at 10 o'clock in the forenoon of Saturday, August 20th 1904, at my office in the Federal building in Fort Worth, Texas, I was attended by Mr. Maurice E. Locke, of counsel for plaintiff, and by Mr. Frank B. Stanley of counsel for the defendants, for the purpose of examining witnesses in said cause orally in accordance with the provisions of the 67th rule in equity and other relevant rules and statutes, and in pursuance of said order.

Thereupon, the plaintiff called as a witness JOHN SWARTZ who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth, in said cause was questioned orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness John Swartz.

(Direct examination by Mr. LOCKE:)

Q. Please state your name, age, occupation and place of residence?
A. John Swartz, born 27th of August 1858; occupation photographer, place of residence, Fort Worth.
Q. How long have you been engaged in the photographing business in Fort Worth?
A. About nine years.
Q. Please state whether you were acquainted with William A. Hunter in the year 1896, and if you were state where you knew him at that time?
A. Yes, I knew him, in Fort Worth that year.
256 Q. Please state what, if any, business or other relationship Hunter sustained to you that year?
A. He was working at my place.
Q. In *my* gallery or at your house?
A. In my gallery.
Q. How long was he in your employ in that year and at what time of the year?

A. From the spring until in the summer sometime, probably three or four months.

Q. What work was he doing for you at that time?

A. He was taking care of the books and waiting on customers assisting me.

Q. What was his compensation for the services during that time?

A. His board and expenses was about all.

Q. About how much per week was that?

A. Five or six dollars, possibly.

Q. Where did he sleep while he was working for you?

A. He slept at my place of business.

Q. Have you ever seen him since 1893?

A. Yes.

Q. When and where have you seen him since 1896?

A. I saw him at his trial in Dallas.

Q. When did that trial occur—about when?

A. In the spring of this year.

Q. Was the man you saw on trial there the same man who worked for you in the spring and summer of 1896?

A. Yes sir.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I don't know anything.

257 Cross-examined by F. B. STANLEY:

Q. When and where did you first become acquainted with William A. Hunter?

A. He came to Fort Worth, in the year about 1885; he worked for my brother some then, canvassing.

Q. Canvassing for what?

A. He was advertising the photograph business for him.

Q. Was he a skilled photographer at the time he worked for you?

A. No sir, he was no photographer.

Q. What was the character of business he did for you?

A. He waited on the customers in the reception room and worked on the books and did such work as he could do.

Q. Was he studying the photograph business at the time he was working for you?

A. No sir.

Q. Have you been a witness in this case before?

A. Yes sir.

Q. Where.

A. At Dallas.

Q. On a former trial of this case.

A. Yes sir.

Q. What was the habits and reputation of William A. Hunter while he was working for you, with reference to his habits and industry?

A. He was a man of good habits and character, as far as I know.

Q. Was he then single or a married man?

A. He was a single man.

JOHN SWARTZ.

I do further certify that the testimony so given by the said witness John Swartz, was reduced to typewriting by me as the same appears at large above, and afterwards at the same time and place
258 was read over to the said witness and was signed by the said witness in my presence and in that of counsel above named, the genuine signature of said witness appearing above.

Thereupon the witness Mrs. J. B. Miller having filed with me a certificate from a physician to the effect that she was unable to appear and testify in obedience to the subpœna served upon her, by consent of counsel in attendance I adjourned the hearing to be continued at her residence in Fort Worth, Texas, at 11:30 in the forenoon of Saturday August 20th 1904. At said time and place we were informed that said witness was still unable to testify and by consent of counsel the hearing was again adjourned to be continued at my office in the Federal building, in Fort Worth, Texas, at 10 o'clock in the forenoon of Thursday, September 8th, 1904.

I do further certify that in pursuance of the adjournment last mentioned, at 10 o'clock in the forenoon of Thursday, September 8th 1904, I was attended by Mr. Maurice E. Locke, of counsel for the plaintiff and by Mr. Frank B. Stanley of counsel for defendants, for the purpose of continuing the examination of witnesses under said order and notice.

Thereupon the plaintiff called as a witness Mrs. J. B. MILLER, who having been by me carefully examined and duly sworn to testify the truth the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of Mrs. J. B. Miller.

Direct examination by Mr. LOCKE:

Q. Please state your name and present place of residence?

A. Mrs. J. B. Miller, 309 Rusk street, Forth Worth, Texas.

Q. Where were you living in December 1896?

A. In Pecos city.

Q. In what business were you and your husband engaged at that time in Pecos city?

A. In the hotel business?

259 Q. Please state whether you remember the circumstances of a man named William A. Hunter leaving Pecos city on the third of December, 1896, and of his camp being found on the 27th of December 1896, on the east bank of the Pecos river and of its being supposed that he was drowned?

A. Yes, sir, I remember the circumstance.

Q. If you do remember the circumstance, please state what, if any, dealings you ever had with said William A. Hunter?

A. He only stopped at the hotel, the train came in during the night and he stopped at the hotel; I saw him there; I waited on him at the table.

Q. About how long did Hunter stay at your hotel after he came there?

A. My recollection is he left the next morning, in a wagon.

Q. Please state whether you saw William A. Hunter as he was about to leave on that occasion?

A. Yes, sir.

—. Please state where he was when you last saw him?

A. In the wagon, going in the direction of the depot, from the hotel.

Q. Please state whether he had been at your hotel just as he went to the wagon?

A. He walked out to his wagon from the hotel office, after he had settled his bill.

Q. What, if anything did he take with him from the hotel to the wagon?

A. His grip and over-coat; he had left them there earlier. He took them with him to the wagon.

Q. What if anything did Mr. Hunter say to you on that occasion about where he was going?

A. He made the remark that he was going to Mentone for a few days, or something to that effect.

Q. What sort of wagon did Hunter have?

A. An ordinary road wagon, side boards on, as well as I remember.

260 Q. Please state what Mr. Hunter had in his wagon, as well as you remember.

A. From a casual observation from the outside, he had a camp outfit, bedding.

Q. Please state whether you have seen Mr. Hunter since that day he left Pecos?

A. To the best of my knowledge I saw him at Dallas.

Q. When, and under what circumstances?

A. I don't remember the month, it was in the spring, it was in a suit over at Dallas.

Q. Spring of this year?

A. Yes sir.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this

cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I can't think of anything.

On cross-examination by Mr. Stanley the witness testified:

Cross-examined by Mr. STANLEY:

Q. Had you ever personally known or heard of William A. Hunter prior to the time he stayed all night at the hotel?

A. No sir, not that I remember.

Q. Q. Was he or not personally known to your husband?

A. No sir, I think not.

Q. Was your husband present at the time?

A. Yes sir.

Q. How was William A. Hunter dressed?

A. In a dark suit as I remember, I don't remember the make of his clothes.

Q. What kind of head cover did he wear?

261 A. I think a black hat.

Q. Was any other person with him in the wagon?

A. No sir.

Q. You say it was a common road, or farm wagon?

A. Yes sir.

Q. Had no springs?

A. No sir.

Q. Have any cover, such as bows?

A. No sir.

Q. How many horses?

A. Two.

Q. What were their color?

A. I do not remember.

Q. Your name is Mrs. J. B. Miller?

A. Yes sir.

Q. Your husband is named J. B. Miller?

A. Yes sir.

Q. What is your name?

A. Sallie Clements Miller.

Q. How long have you been married to J. B. Miller?

A. Sixteen years last February.

Q. Have you resided with him during that time?

A. Yes sir always.

Q. Where and when were you married?

A. At Millburn, Texas, McCullough county, I believe it was in 1888.

Q. You resided there a few months?

A. Yes sir.

Q. Then went where?

A. On the Pecos river, on the ranch for a few months.

Q. Then to what place?

262 A. To Alpine, on the Southern Pacific.

Q. Staid there how long?

A. About two years?

Q. During this time your husband was engaged in what?

A. In stock raising. Horses.

Q. Then where did you go.

A. To Pecos city.

Q. How long did you remain there?

A. I think about seven years.

Q. What business was he engaged in while there?

A. Part of the time he was deputy sheriff, and part of the time jailer, and part of the time hide and animal inspector and then cattle raising business and then hotel business.

Q. When did you leave Pecos city?

A. In 1897 or 1898, I believe in 1897.

Q. From there where did you go?

A. We went to Eastland, Texas.

Q. How *did, long* you remain there and in what business?

A. In the hotel business, and I think we were about a year, a year or thirteen months.

Q. And from there where did you go?

A. To the Pan Handle country. Fifty miles north of Memphis. We were near the line of Oklahoma in Texas.

Q. In what county?

A. In Collinsworth county?

Q. What business was your husband in there?

A. He was special ranger, and in the cattle business.

Q. When did you leave there and where did you go.

A. We lived there about six months and went to Memphis and went in the hotel business.

Q. How long did you remain there?

A. About nine months.

263 Q. From there where did you go.

A. Came to Fort Worth

Q. How long have you been here?

A. About four years.

Q. And in what business has your husband been engaged?

A. For six months we were in the hotel business.

Q. Then in what business.

A. Real estate business, until recently

Q. Now what business are you in?

A. He is managing a ranch in Ward county, near Monohana.

Q. During all this time did you own your own place of residence and home?

A. Not always.

Q. Where did you own your own home?

A. In Pecos, we rented the hotel;

Q. Were you acquainted with A. M. Randolph, in Pecos.

A. Yes sir.
Q. Were you acquainted with his family?
A. Yes sir.
Q. Since your marriage, has your husband been charged with crime or the violation of law?

Plaintiff object- on the ground of irrelevancy.

A. I refuse to answer.

Defendants say that they expect to prove by this witness that during the time she has lived with her husband he has been charged with various crimes, such as murder, conspiracy to defraud and perhaps other crimes, and is now under indictment on a charge of felony, and that the witness is perhaps biased because said William A. Hunter has knowledge of facts prejudicial to her husband.

Q. What time of the year was it Mr. Hunter left the hotel in Pecos
A. Along about the first part of December, I don't remember the day.
Q. What was the occasion of his saying that he was going to Mentone?
A. It seems to me that possibly myself or my husband
264 says "You are not leaving us," and he said he was going to Mentone.
Q. Was any one with Hunter in the wagon.
A. No sir.
Q. Did you notice whether he wore a beard or mustache?
A. Only a mustache, is my recollection.
Q. What was the color of his hair and mustache?
A. Rather on the dark order.
Q. What color was his overcoat and grip.
A. I don't remember his grip had shoulder strap, and it was either tan or red; the coat was a medium light coat; it was not very dark nor very light.
Q. About what size grip was it?
A. Not very large, about fifteen inches long or eighteen inches long
Q. About how deep?
A. About twelve inches, it was a small grip.
Q. Was the grip of sufficient size and capacity to hold clothing for a journey or trip?
A. It would hold undersuits or something like that, it is owing to how much clothing you take for a trip.
Q. Did you know Mrs. Mettler?
A. Yes sir.
Q. Where.
A. There at Pecos city.
Q. Was she living there at the time he left the hotel?
A. Yes sir.

Q. Did Mr. Hunter say anything about his sister at the time he was there?

A. That morning after breakfast he inquired the direction to where his sister was living, and I think her and Mrs. Heitman was running a boarding house.

Q. What direction was that boarding house from the hotel?

A. I think it was south, or southwest.

265 Q. Do you know whether Hunter saw his sister after leaving your hotel?

A. No, I do not.

Q. Do you know whether he left his overcoat and grip with his sister?

A. He left them at the hotel, went on to see his sister and then came back by the hotel and got his overcoat and grip, is my recollection.

Q. Do you know whether W. A. Hunter left Pecos immediately after he left your hotel or whether he stand around town for a few hours or a few days?

A. He drove off in the direction of Mentone.

Q. What direction?

A. North or northwest, he went out that road?

Q. How far was it to Mentone.

A. Five or six miles, it might have been further, or not so far.

Q. What day of the month was it, and year, that he left your hotel?

A. I don't remember, it was along the first part of December in 1896.

Q. Do you know whether he was back in Pecos that night?

A. No, sir.

Q. Did he know he had a sister keeping boarding house in Pecos?

A. He said so.

Q. How long had Mrs. Mettler been living there?

A. I don't know, not very long, no one didn't know her very well,

Q. You are not able to say that on this occasion when he left your hotel that he was then on his way to the place where his team was afterwards found, that is, of your own knowledge, and he was supposed to be drowned?

A. I know of his starting for that place, and he never returned.

Q. How long was it before his camp was found?

A. I think a couple of weeks, possibly not so long and possibly longer.

266 Q. Did you see his sister, Mrs. Mettler after he left, and before they went to search for his body?

A. No, I saw her around town, but not to mention the fact that her brother was lost.

Q. Do you know how the news came to Pecos that he was lost or drown-?

A. No.

Q. Did you hear how far he got?
A. He got to Mentone where it was, there was no houses there.
Q. Five or six miles from Pecos.
A. Yes sir.

Redirect examination by Mr. LOCKE:

Q. Did you ever go to the place where Hunter's camp was found on the river?
A. No sir.
Q. All you know about the distance from Pecos to that camp or to Mentone or about the location of the camp is simply an impression which you have received from the neighborhood talk?
A. Yes sir, that was it exactly.
Q. Please state whether either you or your husband have any interest of any kind direct, or indirect in the result of this litigation?
A. We have not.

Recross-examination:

Q. Did any person come to see you or your husband, or talk with you and your husband in regard to these facts or any of them?
A. Not to my knowledge.
Q. Do you know how they learned that you had knowledge of these facts.
A. No sir, I didn't know anything about it until the deputy marshal served papers on me. I hadn't thought of it before.
Q. Did you know one Milliken?
A. I don't remember that name.
267 Q. A lawyer or traveling agent of the company.
A. No, I didn't know him, he might have been to the hotel but I had no occasion for remembering him.

MRS. J. B. MILLER.

I do further certify that the testimony so given by the said witness Mrs. J. B. Miller was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of both the counsel above named, the genuine signature of said witness appearing above.

I do further certify that the depositions of the witnesses above named have been retained in my possession until this moment, and that I am sealing the same and addressing the same to the circuit court of the United States for the northern district of Texas, at Dallas, Texas, for transmission by mail to said court.

In testimony whereof I have hereunto set my hand at Fort Worth Texas, this the 19th day of September A. D. 1904.

GEO. W. PARKER,
Special Examiner.

Filed Dec. 24, 1904.

J. H. FINKS, Clerk.

268 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris H. Spoonts, and Phillips Investment Company, Defendants. } No. 597. In Equity.

I, Geo. W. Parker, who was specially appointed an examiner in the above styled cause by order of the court, made August 8th, 1904, do hereby certify that at 10 o'clock in the forenoon of Monday, August 22, 1904, at my office, in the Federal building, at Dallas, Texas, I was attended by Mr. Maurice E. Locke, of counsel for plaintiff and Mr. W. M. Alexander, of counsel for the defendants, for the purpose of examining witnesses in said cause orally, in accordance with the provisions of the 67 rule in equity, and other relevant rules and statutes and in pursuance of said order.

Thereupon the plaintiff called as a witness H. B. TAYLOR, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness H. B. TAYLOR.

Direct examination by Mr. LOCKE:

Q. Please state your name.
A. H. B. Taylor.
Q. How old are you?
269 A. I will be 59 years old the 23rd day of October.
Q. What is your business?
A. I am traveling inspector of the Colonial and United States Mortgage Company, Limited, of Hull, England. I live in Dallas.
Q. How long have you lived in Dallas?
A. I have lived here about twelve or thirteen years.
Q. Were you acquainted with William A. Hunter?
A. Yes sir.
Q. When and where were you acquainted with him?
A. I first knew him at Quanah, Texas. He was a member of the firm of Metler & Hunter. I th-nk real estate.
Q. How long and how well did you know him?
A. I knew him for two or three years -here at that place. I afterwards knew him here in Pecos.
Q. Do you remember the occurrence of his disappearance from Pecos in December, 1896?

A. I remember he disappeared.
Q. When and where did you see him last before his disappearance?
A. I saw him here in Dallas.
Q. How long before his disappearance?
A. About the time of the presidential election. In November, 1896.
Q. Have you ever seen him since his disappearance?
A. Yes sir.
Q. When and where?
A. I saw him in Birmingham, Ala. in jail, about a year ago.
Q. Did you recognize him when you saw him there?
A. Yes sir.
Q. Did he recognize you?
A. Yes sir, I think so, I knew he did.
Q. Who if any one, was with you from Texas, in Birmingham?
A. Capt. A. J. Brown.
Q. Please state whether Hunter recognized Capt. Brown and called him by name.?
270 A. Yes sir, he did.
Q. Please state whether you were present at the hearing of William A. Hunter's hearing upon a writ of *habeas corpus* in Birmingham, Ala.?
A. Yes, sir, I was.
Q. Under what name did he make that application, and what did he claim was his name?

(Defendant- objected, because the records would be the best evidence.)

A. He made the application under the name of William A. Hunt, and claimed that was his name at that time.
Q. When and where, and under what circumstances did you see Hunter after you saw him in Birmingham?
A. The first time I saw him after that I saw him walking on the streets of Dallas, after he was brought back here by the sheriff.
Q. Did you see him in court?
A. Yes sir.
Q. Under what circumstances?
A. He was on trial in the criminal district court of Dallas county. In April of this year, charged with swindling the insurance company.
Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.
A. I can't say that I do; that is about all I know about the case.

Cross-examined by Mr. ALEXANDER:

Q. Mr. Taylor, you testified as a witness for the defendant, did you not, in the case of Jennie M. Metler against the Fidelity Life Insurance Company?

A. Yes sir.

Q. A. lawsuit tried in this courtroom?

A. Yes sir.

271 Q. The matters of fact you testified to in that case were true, according to your judgment?

A. Yes sir.

Q. You went to Birmingham with Mr. Brown, did you not?

A. Yes sir.

Q. William A. Hunter is now in Birmingham, isn't he?

A. I don't know personally, I think so.

Q. He was discharged by the court of criminal appeals?

A. I don't know. I heard he had been discharged; I saw that in the papers.

Q. You were told by Mr. A. J. Brown, State agent of the insurance that he had sued his company for fifty thousand dollars damages in Birmingham?

A. Yes sir.

(Counsel for the plaintiff objected, because it is irrelevant and immaterial.)

H. B. TAYLOR.

I do further certify that the testimony so given by the said witness H. B. Taylor was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of both counsel above named, the genuine signature of said witness appearing above.

Thereupon the plaintiff called as a witness JOSEPH E. GILBERT, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and give answers and testimony as follows:

Testimony of the Witness Joseph E. Gilbert.

Direct examination by Mr. MAURICE E. LOCKE:

Q. Please state your name, profession and place of residence.

A. Joseph E. Gilbert; lawyer, and reside in Dallas, Texas.

272 Q. How long have you been practicing law and what was the style of your firm in the years 1897 to 1900?

A. I have been practicing law twenty-four or twenty-five years; in 1897 my firm was Perkins, Gilbert & Perkins; in 1898 and 1899,

Perkins, Gilbert & Hall, is my recollection; the members of the firm of Perkins, Gilbert & Perkins were also those of Perkins, Gilbert & Hall, with the addition of W. L. Hall.

Q. What professional relation did you sustain to the cause of Jennie M. Metler *v.* The Fidelity Mutual Life Association during those years?

A. I was attorney for the defendant.

Q. That suit was number 2118 on the law docket of this court?

A. I think so.

Q. How many times was that case tried in the circuit court?

A. The trial was begun and a large portion of the testimony taken before the trial in which judgment was rendered, I have forgotten at what term, but I believe the term before the trial: that was not concluded, my recollection is, on account of the serious injury of Judge Meek, rendering him unable to finish the business of the term.

Q. Please state whether you were present and participated in both the trials of the case?

A. I was.

Q. What attorneys were present and actively participated in behalf of the plaintiff at those trials?

A. Mr. W. H. Clark, and my recollection is that Mr. M. A. Spoonts in both trials, I know he was at the last trial, and I think he was in both.

Q. For how long a time and to what extent, if at all, did Mr. Spoonts take part in the litigation as attorney for the plaintiff?

A. I don't know just when he came into the case, but I think he was here during both trials; I know he was at the trial at which judgment was rendered.

273 Q. You don't know when he first signed pleadings and appeared?

A. No sir, I do not.

Q. Please state whether you were in attendance continuously throughout the trial at the May term, 1900, when the judgment was rendered?

A. I was.

Q. State whether you took part in the examination of the witnesses and heard their testimony?

A. I did.

Q. Who prepared the defendant's bill of exceptions of this court, on which the case was taken to the Supreme Court of the United States?

A. I did.

Q. How long after the trial was it that you prepared that bill of exceptions?

A. About sixty days I think; within that time, is my recollection; I got an order of the court extending the time in which to prepare the bill.

Q. Please state whether or not you knew at the time you prepared

the bill of exceptions that it was a substantially full and accurate statement of the proceedings had on trial?

A. Yes sir.

Q. What if anything, has occurred since that time to cause you to think about the litigation and keep the occurrences of the litigation fresh in your mind?

A. Well, there has been nothing, except the affirmance of it by the Supreme Court and the arrest and prosecution of Hunter, the alleged deceased.

Q. You have heard these matters talked about and talked about them yourself?

A. Yes, and have seen newspaper accounts and such things as that.

Q. Please state whether you personally examined the original bill of exceptions prepared by you in that case?

A. I have.

Q. When you prepared that bill of exceptions did you
274 have the original depositions before you?

A. Yes sir.

Q. Did you have a stenographic report of the oral testimony?

A. Yes sir.

Q. Please state whether or not the original bill of exceptions in said cause now on file among the papers thereof contains a substantial, full and accurate statement of all the evidence introduced upon the trial of said — at the May term, 1900, the term at which judgment was rendered therein?

A. It does, except that the policies are not copied into it—into the bill of exceptions; they were copied it the record as it went up. The policies are not copied in the bill of exceptions; it calls for them and they were copied into the record; we didn't have them and couldn't get them to put them in the bill of exceptions; we got the originals by an order of the court.

Q. Please examine this paper and state whether or not it is the original bill of exceptions concerning which you have been testifying?

A. Yes sir, this is the original bill of exceptions.

Plaintiff offered in evidence the original bill of exceptions in cause No. 2118, Jennie M. Metler *v.* The Fidelity Mutual Life Association of Philadelphia.

Q. Please state whether the judgment in the cause of *the* Jennie M. Mettler against The Fidelity Mutual Life Association was ever paid?

A. It was.

Q. If so, when and how?

A. It was paid by a check or draft, which I think, was drawn by the defendant on the Real Estate & Trust Company, is my recollection.

Q. Please examine the paper I have handed you and state whether it is the original check by means of which the judgment was paid?

A. Yes sir, this is the original check.

Q. To whom was that check sent by the defendant company?

A. It was sent to me, or our firm.

275 Q. What disposition did you make of it?

A. I delivered it to Mr. C. H. Lednum, the deputy in the clerk's office of this court.

Q. For what purpose?

A. For the purpose of paying the judgment in this case.

Q. I will ask you to read that check to the stenographer?

A. The caption is: "Fidelity Mutual Life Insurance Company, Philadelphia, May, 29, 1902, No. 2505. $24,028.25. Pay to the order of J. H. Finks, clerk of the United States circuit court, Dallas, in full of judgment in the case of Mettler *v.* Fidelity Mutual Life Association, with interest thereon to June 4, 1902." Then written with pen is: "Twenty-four thousand and twenty-eight dollars and twenty-five cents." Signed "O. C. Bosbyshell, treasurer, on the Real Estate & Trust Company of Philadelphia, Penn. F. X. Quinn, assistant secretary." Endorsed, "Pay E. J. Gannon, cashier, or order;" signed "J. H. Finks, clerk U. S. circuit court, Dallas." The bank endorsed it "Pay to any bank or banker; The American National Bank, Dallas, Texas. E. J. Gannon, cashier."

Q. Do you find any punched word, indicating whether it was paid or not?

A. Yes, the word "Paid" is punched in the draft.

Q. What date?

A. "6–6–'02," is also punched in the draft.

Q. Please state whether soon after the arrest of Hunter in Alabama you made a careful examination among your papers for any papers connected with this cause of Mettler against Fidelity Mutual Life Association, and especially for the original application for the policies?

A. I did.

Q. Please state whether or not you found that original application?

A. I did not.

Q. Is that application within your possession or control? Do you know its whereabouts?

A. No sir, I have looked everywhere I keep papers for it

276 and have been unable to find it.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I can recollect nothing further of interest to either party.

Cross-examined by Mr. ALEXANDER:

Q. You made delivery of the draft that you have identified to the clerk of this court?

A. Yes sir.

Q. You received that from the company's office in Philadelphia, by mail?

A. Yes sir, through the mail.

Q. It is a fact, is it not that that draft was issued and payment made before any mandate was issued from the Supreme Court of the United States?

A. That is my recollection, yes sir.

Q. Did they instruct you or not—your client, did they urge any further defense, or register any other protest with respect to the suit of Mettler against the company?

A. No sir, not after it was affirmed by the Supreme Court.

Cross-examined by Mr. F. B. STANLEY:

Q. Did you at any time you were defending the suit have reason to suspect or believe that W. A. Hunter was living?

A. I suspected he was living.

Q. Did you take any testimony to prove that he was not dead?

A. We introduced testimony of all the circumstances that we knew of to show that he was not dead and submitted them to the jury.

Q. Was that the principal issue in that case?

A. Yes sir, that was the main issue, as to whether or not he was dead.

JOSEPH E. GILBERT.

277 I do further certify that the testimony so given by the said witness J. E. Gilbert was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness, and was signed by the said witness in my presence and in that of counsel above named, the genuine signature of said witness appearing above.

Thereupon the plaintiff called as a witness C. R. BUDDY, who having been by me carefully examined and duly sworn to tell the truth the whole truth and nothing but the truth in said cause, was questioned by counsel and give answers and testimony as follows:

Testimony of the Witness C. R. Buddy.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?

A. C. R. Buddy; private residence Oak Cliff.

Q. What official relation do you sustain, if any, to the City National Bank of Dallas?

A. I am cashier of the City national bank.

Q. How long have you held that position, and how long have you been connected with the bank?

Q. I have been connected with the bank since 1894; I have been cashier since February, 1902.

Q. Please state whether one William A. Hunter, or W. A. Hunter, ever had an account with the City National Bank of Dallas?

A. He did.

Q. If so, when?

A. I hav-n't got the exact date when the account was opened; the account was closed in 1896. This is a statement taken from the books—September 19, 1904, the account was opened, and run until November 7, 1896.

Q. Please state whether you have with you an abstract of the account of W. A. Hunter with the City national bank as same
278 appears upon the books of the bank?

A. Yes sir. This is an abstract from the books of the bank.

Q. Does that paper, which we will call "Exhibit A," to your testimony, represent accurately the transactions had by W. A. Hunter with your bank?

A. Yes sir, as far as I know; it is an abstract of the books of our bank.

Q. Have you the original check by means of which Hunter closed his account?

A. Yes sir.

Q. Will you produce it. (Produces it.) That is the original check?

A. Yes sir, this is the original check.

Q. Read it to the stenographer.

A. "Dallas, Texas. November 7, 1896. City national bank, Dallas, pay to the order of self $163.30. W. A. Hunter." Endorsed on back: W. A. Hunter," and stamped "Paid" by the City national bank, November 7, 1896, by paying teller, Dallas, Texas.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I don't know of anything else.

Plaintiff offered in evidence the statement of account identified by the witness Buddy, and marked same "Exhibit A," and attached to the deposition.

Cross-examined by Mr. W. M. ALEXANDER:

Q. Are you acquainted with Mr. H. B. MacDonald?
A. Yes sir.
Q. Did he testify on the trial of the case of Jennie M. Mettler against The Fidelity Mutual Life Association of Philadelphia?
A. I don't know.
279 Q. He was in the employ of the City national bank as book-keeper in the year 1900?
A. Yes sir.
Q. Were you acquainted with Mr. Hunter personally?
A. No sir.

C. R. BUDDY.

I do further certify that the testimony so given by the said witness C. R. Buddy was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties and counsel as were in attendance; the genuine signature of the said witness appearing above.

280 Please examine and report on this statement at once.
If not advised to the contrary within thirty days after receipt, we shall understand that you acknowledge this statement to be correct.

W. A. Hunter in Account with the City National Bank of Dallas, Texas.

Dr.			Cr.	
1894.			1894.	
Sept. 19	Your No.	50	Sept. 9	554 74
25		57 25	28	57 80
Oct. 11		17 25	1895.	
Nov. 8		10	Feb. 15	136 10
12		32 35	Mar. 30	23 97
13		10	May 6	31 85
20		10	1896.	
Dec. 4		25	Mar. 18	88 30
4		25	Oct. 26	85
1895.				
Feb. 26		10		
26		10		
11		5 50		
12		75		
Mar. 1		10 95		
Apr. 9		10		
July 18		25		
27		35		
Oct. 5		25		
11		50		
Nov. 9		5 25		
14		3 25		
15		5		
Dec. 7		20		
12		5		
1896.				
Feb. 25		10		
27		25		
Mar. 3		10		
10		5		
16		10		
18		5		
25		5		
26		15		
Apr. 1		50		
May 1		50		
Oct. 31		97 65		
Nov. 7		163 31		
		977 76		977 76

"Exhibit A."

281 Thereupon the plaintiff called as a witness J. H. FINKS, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness J. H. Finks.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence.
A. My name is J. H. Finks; my residence is Dallas.
Q. What official position, if any, do you hold in connection with the United States circuit court?
A. I am clerk of the United States circuit court for the northern district of Texas.
Q. How long have you been such clerk?
A. I have been clerk since May, 1879.
Q. Please state whether in your official capacity you had any connection with the payment of a judgment rendered in cause No. 2118 entitled Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia?
A. I did.
Q. Was that judgment paid through your office?
A. Yes sir.
Q. When was it paid?
A. About June 2nd, 1902.
Q. Will you examine this paper and state whether it is the original check by means of which the judgment was paid into your office?
A. Yes sir, this is it.
Q. What disposition was made by your office of that check?
A. I deposited it in the American National Bank of Dallas, to the credit of the circuit court of the United States at Dallas.
Q. Did you carry at that time an account with this case or make a separate fund of this money represented by this check?
A. No sir, I just deposited it to the credit of the United
282 States circuit court at Dallas.
Q. Was it carried as a separate fund in your office?
A. Yes sir, I carried it as a separate fund in my office on the registry book.
Q. Examine this check and read it to the stenographer.

(It was agreed by counsel that the check handed to the witness is the same check copied into the testimony of J. E. Gilbert.)

Q. Was that check ever paid?
A. Yes sir.
Q. What disposition did you make of the fund received on the check?

A. I deposited that check in the American national bank to the credit of the United States circuit court at Dallas, and I checked against that fund and distributed the funds. There was no actual cash handled.

Q. State to whom the payments were made?

A. The checks were issued to the Phillips Investment Company of Kansas City, Mo., $1540.25; M. A. Spoonts, attorney $1500; C. A. Culberson $1026; W. H. Clark, attorney for Jennie M. Mettler $11,616; W. H. Clark, attorney, $8,346.

Q. Are the original checks in your possession?

A. No sir. The checks are not surrendered by the bank for any funds paid out by any distributing officer of the Government; they are retained by the bank.

Q. The American national bank, in this case?

A. Yes sir.

Q. Did you take receipts for the payments made by you?

A. Yes sir.

Q. I will ask you to read to the stenographer the receipts that you have for them?

A. Receipt No. 1525 for $1540.24 to the Phillips Investment Company signed by Alexander & Thompson.

Q. Are you acquainted with the signature of Alexander & Thompson?

Mr. ALEXANDER: We admit that this is the genuine sig-
283 nature of Alexander & Thompson—Phillips Investment Company, by Alexander & Thompson.

Q. What does the receipt show the money was paid for?

A. The receipt shows it was paid on account of a judgment in the case of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia, No. 2118.

Q. By what authority did you make that payment?

A. By the authority of Mr. W. H. Clark, who was attorney, and also by a transfer from Clark to the Phillips Investment Company.

Q. Have you among the files of this case the original assignment from W. H. Clark to the Phillips Investment Company?

A. Yes sir.

Q. Of his interest in this judgment?

A. Yes, of a part of his interest.

(The stenographer will copy the assignment above referred to and mark same "Exhibit A" to the deposition of J. H. Finks.)

Q. Have you among the files of this case the original note to secure which the assignment just referred to is made?

A. Yes sir.

Q. Is the paper you have in your hand the original paper?

A. Yes sir.

This will be copied and made "Exhibit B."

Q. When and by whom was the original assignment marked "Exhibit A" filed in your office?

A. It was filed the second day of December, 1901.

Q. By whom was it filed?

A. By J. H. Finks, clerk, by W. A. Porter, deputy.

Q. Who left it in the office?

A. I don't know.

Q. By what authority did you make payment of $11,616, represented by your check No. 428, to W. H. Clark, attorney of record for the use of Mrs. Mettler, if you had any other authority?

284 A. He was attorney of record and asked that it be paid to him, and I asked him if he had any authority other than being attorney of record, and he presented to me a letter dated Homer, Ohio, May 12, 1902, in which he was requested to collect it.

Q. Have you that original letter in your possession? Among the files of this case?

A. Yes sir.

That letter will be copied and made Exhibit C, for identification.

Q. When was that letter filed with you?

A. The 4th of June, 1902.

Q. By whom does it purport to be signed?

A. Mrs. J. M. Mettler.

Q. By what authority did you pay on account of such judgment to W. H. Clark, as per your check No. 427, $8 346? Have you any original papers on file in connection with the payment — Clark any assignment from Mrs. Mettler?

A. Yes sir.

Q. Describe this sufficiently for identification.

A. I have two powers of attorney.

Q. What does that instrument purport to be?

A. It seems to be a power of attorney, assigning a part of any judgment she may recover, executed by Mrs. Jennie M. Mettler.

Q. That was filed in your office what date?

A. I think it was executed to Alexander, Clark & Thompson.

Q. Filed when, in your office?

A. June 3rd, 1902.

That instrument will be copied and marked "Exhibit D."

Q. Have you any further assignment from Mrs. Mettler?

A. I have an assignment filed June 3, 1902.

Q. Describe that; that purports to be signed by whom?

A. By Jennie M. Mettler.

Q. In favor of whom?

285 A. Alexander, Clark & Hall.

Copy of this instrument will be marked "Exhibit E."

A. There is a transfer in there from Alexander, Clark & Hall to Clark.

Q. By what, if any special authority, did you make payment to C. A. Culberson of $1026 represented by your check 426; have you any letters or papers?

A. That was paid on a letter of instruction May 8, 1902, signed by C. A. Culberson, and addressed to C. A. Rasbury, Dallas, Texas.

Q. Was that letter filed with you?

A. I don't seem to have the file mark on that letter.

Q. It has been in your possession ever since?

A. Yes sir, Mr. Rasbury handed it to me and I kept it with the papers.

This letter was copied and marked "Exhibit F" for identification.

Q. What conversation, if any, did you have with Mr. Clark regarding making the payment of the $1026 to Mr. Culberson?

A. He instructed me to pay Mr. Culberson that amount, deducting it out of the amount that should be paid to him.

Q. What, if any special authority did you have for the payment of $1500 made to M. A. Spoonts.

A. I had a letter from M. A. Spoonts, saying that he had an interest of $1500 in the judgment, and asked me to remit to him.

Q. Under what date?

A. The letter is not dated.

Copy of letter from Mr. Spoonts will be marked "Exhibit G" for identification.

Q. State whether or not you are familiar with the signature of Mr. Spoonts?

A. I am familiar with the signature.

Q. What other letter have you?

285½ A. I have a letter from William A. Clark to Mr. M. A. Spoonts bearing date May 26, 1902, stating that the judgment would be paid off in a few days, and that he would have the clerk remit to him the $1500.

Q. Are you familiar with Mr. Clark's signature?

A. Yes sir.

Q. State whether or not that is the genuine signature of his appended to that letter?

A. It is.

This letter will be copied and marked "Exhibit H" for identification.

Q. From whom did you receive these two letters—Exhibits G and H?

A. My recollection is I received them from Mr. Spoonts. Mr. Spoonts had been over here before I received the letters and talked to me about the matter, saying he had a fee of $1500 in it.

Q. What did he say to you on that occasion—what request, if any, did he make?

A. He asked me to remit as soon as it was ready to be disbursed; I don't believe at the time he was here the money had been paid into the office.

Q. Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I know of nothing further.

Cross-examination by Mr. W. M. ALEXANDER:

Q. What balance did you have in your account—what bank was it?

A. The American national bank.

Q. What balance did you have in your account with the American national bank on the 2nd day of June—what was your balance on that date?

286 A. I don't know, at one time I had an account of over thirty thousand dollars.

Q. Before you received this draft? Including this draft? Including this draft you had one account running something over $30,000?

A. This is a guess, I don't know how much I had; I have had $1000,000, but that was long afterwards.

Q. You handled no money in connection with this judgment?

A. No.

Q. The draft was for $24,028.25; that was deposited by you and you got credit in your general account with the bank for that sum?

A. The court got credit?

A. There was only one account.

Q. I have a circuit court account for Dallas, a circuit court account for Fort Worth, a circuit court account for Abilene and one for San Angelo; in this case the circuit court at Dallas got credit for this amount; they sent me the check and I deposited it in the bank, and that was credited to the United States circuit court at Dallas, and then I checked against it.

Q. Any check given by you on that fund, signed as clerk, was recognized and honored as against the fund on hand?

A. The check was signed by me as clerk and countersigned by Judge Meek as judge.

Q. Any memorandum endorsed on the receipt that you have taken—testified about as having taken from Culberson, Spoonts, Clark and Phillips Investment Company, was memorandum for your office?

A. Yes sir.

Q. In keeping the accounts here in the office?

A. Yes sir.

Q. Then the check that you received from the insurance company

for $24,028.25, that was mixed with the other funds in the bank in the account of the circuit court for Dallas?

287 A. Yes sir.

Q. Do you know, Mr. Finks, of your own knowledge, whether the Phillips Investment Company received the money on the check you gave? Do you know and from what source they received their money?

A. They received it from the attorneys, I have no receipt from them.

Q. Do you know whether the money on that check that you gave, was ever paid to them?

A. No sir.

Q. You don't know whether the check given to Spoonts was paid or not?

A. No sir.

Q. You don't know whether the check to Clark was paid or not?

A. I know that by hearsay only; the check to Mrs. Mettler—I went to the bank and asked them about this amount; there was something come up, I forget what it was; Clark didn't remit promptly and I went to the bank to see about it.

Q. That note of W. H. Clark's to the order of the Phillips Investment Company, is marked paid is it not?

A. Yes, "Received payment, Alexander & Thompson."

Q. And it is canceled?

A. Yes.

Q. You have held that note as a voucher against payment?

A. Yes.

Q. Why did you not pay the Phillips Investment Company the whole amount of Clark's interest in that judgment?

A. The Phillips Investment Company never claimed the whole interest.

Q. They only claimed an interest of $1400 and some odd dollars, and interest?

A. Yes, $1471.57 I think.

Q. You demanded the surrender of that note and the receipt before issuing that check to the Phillips Investment Company, did you not Mr. Finks?

288 A. I think I did.

Q. You would not have paid that amount without the surrender and cancellation of that note?

A. No, sir.

Q. What was the date that was issued?

A. The draft to the Phillips Investment Company? *A* The receipt is dated June 3, 1902.

Q. When was the check issued to Clark?

A. I think it was dated June 3rd, 1902.

Q. Can you state whether or not W. H. Clark had on June 3 and 4, 1902 more than the sum of $2000?

A. I presume so.

Q. You know he had a check?
A. I don't quite catch your question.
Q. Did he have as much as $2000?
A. If he had the amount of these checks he had more—very much more.
Q. He had the amount of these checks didn't he?
A. Yes, I think he did; I don't think he had it very long after he got the checks.
Q. He paid his debts out of it?
A. I understood so.

Cross-examination by Mr. F. B. STANLEY:

Q. Do you know as a fact whether or not that original check deposited with you by the plaintiff, The Fidelity Mutual Life Insurance Company, whether it was ever actually paid, and to whom it was paid?
A. I simply presume it was paid, I got credit for it the same as if it was paid.
Q. You transferred it to this bank—sold it to the bank?
A. No sir, I deposited it as cash item in the bank.
Q. Did you get credit at once? Didn't you deposit it for collection?
A. No sir, I deposited it as cash and got credit for it.
Q. Discounted?
289 A. No sir.
Q. It was taken as commercial exchange?
A. Yes, they give me credit for the whole amount?
Q. The same day you deposited it?
A. Yes sir.
Q. Do you know whether that check was in fact ever paid by any body and taken up?
A. No sir, I don't know.
Q. They gave you the money at once—credit?
A. Yes sir.
Q. There was no money actually paid?
A. No, they gave me credit; they nefer made any claim on me; I disbursed the money.
Q. You would not be bound to pay it back to them would you?
A. I don't know, that is a question of law.
Q. Did the check bear your endorsement?
A. Yes sir, the original check I hav-n't got; (check handed to witness by Mr. Locke): Yes, I endorsed it: "Pay to E. J. Gannon, or order; J. H. Finks, clerk." The bank endorsed it "Pay to any bank or banker; American National Bank, E. J. Gannon, cashier; marked paid 6-6, '02."

Redirect examination by Mr. LOCKE:

Q. In your direct examination you stated that you took receipts of the parties to whom you issued these checks?
A. Yes sir.

Your receipts from the Phillips Investment Company will be copied and marked "Exhibit I."

Copy of receipt from William H. Clark, attorney, from Jennie M. Mettler will be attached and marked "Exhibit J."

Copy of receipt from William H. Clark, individually, will be attached and marked "Exhibit K."

Copy of receipt from M. A. Spoonts will be attached and marked "Exhibit L."

290 Copy of receipt from C. A. Culberson will be attached.

"EXHIBIT A."

THE STATE OF TEXAS, }
County of Dallas. }

Know all men by these presents,

Whereas, W. H. Clark of Dallas, Texas, was indebted to the Phillips Investment Company of Kansas City, Missouri, in the principal sum of $5250.00, as evidenced by the deed of trust securing the same, recorded in Book — page —, of the records of deeds of trust of Dallas county, Texas; and,

Whereas, said W. H. Clark owed said company interest on said principal debt, and taxes on the property embraced in said deed of trust, aggregating $1471.57;

Now therefore, in consideration of the said Phillips Investment Company's having accepted a deed from him to said property in satisfaction of said principal indebtedness, and taken his promissory note for said sum of $1471.57, as agreed and understood to secure the payment of said note of $1471.57, I, the said W. H. Clark, do hereby assign, transfer, grant, sell and confirm unto the said Phillips Investment Company, all of my right, title and interest; that is, my contingent attorney's fees of about $8000.00 in the cause of action and judgment of $21,550.00 rendered thereon on the 4th day of July, A. D. 1900, in the United States circuit court for the northern district of Texas, at Dallas, in the life insurance case of Jennie M. Mettler *vs.* Fidelity Mutual Life Association of Philadelphia, numbered 2118; said judgment rendered as aforesaid in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States.

Provided, always, and these presents are upon the express
291 condition, that the said W. H. Clark, or his heirs, executors or administrators, or assigns, shall pay or cause to be paid to

the said Phillips Investment Company, at Dallas, Texas, said note of $1471.57, with the interest and attorney's fees that may accrue thereon, then and from thenceforth these presents, and everything herein contained, shall cease and be null and void, anything herein contained to the contrary notwithstanding.

It is expressly understood and agreed that nothing herein contained shall in any way interfere with the said W. H. Clark in the conduct of said litigation in his capacity as leading counsel therein for the said Mrs. Jennie M. Mettler.

Witness my hand, this the 29th day of October, 1901.

W. H. CLARK.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, W. H. Mansfield, a notary public in and for the county of Dallas, State of Texas, on this day personally appeared W. H. Clark, known to me to be the person whose name is subscribed to the foregoing instrument of writing, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 8th day of November, A. D. 1901.

[SEAL.]

W. H. MANSFIELD,
Notary Public, Dallas County, Texas.

The foregoing has the following endorsement, to-wit:

A. No. 2118; Jennie M. Mettler *vs.* Fidelity Mutual Life Insurance Association. Filed 2 day of December, 1901. J. H. Finks, clerk, by Willie A. Porter, deputy.

292 $1471.57. DALLAS, TEXAS, October 29, 1901.

On or before the first day of March, 1902, for value received, I promies to pay to the Phillips Investment Company, or order, the sum of fourteen hundred and seventy one dollars and fifty seven cents, with interest thereon from date until paid at the rate of eight per cent. per annum, interest payable semi-annually as it accrues.

This note is secured by an assignment of my interest in a certain judgment obtained in the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 2118, Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia, Penn., in the year 1900.

It is expressly provided that all past due interest on this note shall bear interest from maturity thereof at the rate of ten per cent. per annum.

It is further provided that if this note is placed in the hands of an attorney for collection, or if collected by suit, ten per cent. additional is to be added on the principal and interest then due as attorney's fees.

W. H. CLARK.

Written across the face of the foregoing note is the following:
Rec'd payment; Alexander & Thompson.
The foregoing has the following endorsement upon the back thereof:
2392. Note $1471.57. W. H. Clark to Phillips Investment Company; dated Oct. 29th, 1901; due M'ch 1st 1902. "B"

293 C.

HOMER, OHIO, May 12, 1902.

MY DEAR MR. CLARK: My people rec'd your telegram and phoned me at once—of course I was delighted and thank you. Your letter was waiting me Saturday. The victory is ours and I congratulate you. It was indeed a long and hard fought battle, but ours at last.

Wonder how old Millican feels—you know my contempt for the man so you can judge how I rejoice over his defeat Wouldn't he look sour now.

If there was or is anything more he can do, he will do it.

I do not care to go to Texas before fall unless it is necessary—so you may remit my money to me at the *Wilson bank*, Utica, O.

I understand the third of whole amount goes to my lawyers—and I pay Sen. Culberson $500.00.

When you have leisure write me the particulars of the operations in Washington.

Thank you for your kindness and interest manifested in my welfare and hope you will meet with as much success in every case.

Let me hear from you once in a while.

Yours truly, MRS. J. M. METTLER.

P. S.—You have some papers, letters, &c.—if you will kindly put them aside and keep them I will get them in the fall or winter.

The foregoing letter has the following endorsement, to-wit:
Filed 4 day of June, 1902; J. H. Finks, clerk, by W. A. Porter, deputy.

The foregoing letter is enclosed in an envelope bearing the necessary amount of postage, and bears the post-marks of Homer,
294 O., Utica, Ohio, and Dallas, Texas, and is addressed to "Mr. Wm. H. Clark, Dallas, Tex., N. Tex. Bank bldg.," and is endorsed as follows:
Filed 4 day of June, 1902; J. H. Finks, clerk, by W. A. Porter, deputy.

"Ex. D."

Power of Attorney.

Filed June 3rd, 1902.

THE STATE OF TEXAS, }
County of Dallas. }

Whereas, Mrs. Jennie M. Mettler, of Pecos, Texas, did employ Alexander, Clark & Hall of Dallas, Texas, as her attorneys, to collect from the Fidelity Mutual Life Insurance Association of Philadelphia, by suit or otherwise, the three certain policies executed by it on October 31st, 1896, upon the life of her brother, W. A. Hunter, of Pecos, Texas, the policies numbered respectively D–73372, D–73373 and D–73374, and being for $5000.00 each; her said brother having departed this life on or about December 4th, 1896, being drowned in the Pecos river, and his body never recovered; it being agreed in her said power of attorney that her said attorneys were to receive a contingent fee of one-third of the amount collect- by suit or otherwise, she not being able to pay a cash fee; for a full description of which power of attorney reference is here made thereto; and

Whereas, said attorneys have had to institute suit, the same being No. 2118, Mrs. Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia, now pending in the Federal court at Dallas; and

Whereas, said attorneys, the firm now being Alexander, Clark & Thompson, of Dallas, have had far more labor, consumption of time and trouble with the collection of said policies than was an-
295 ticipated when first employed, as aforesaid; the insurance company claiming: 1. That the proofs of death furnished it did not and do not reasonably show death; 2. That the statement in W. A. Hunter's application for insurance to the effect that his occupation was "real estate business and farming" was not true—the policy providing that any false statement in the application would vitiate the policy; 3. That W. A. Hunter is not dead.

Now, therefore, this agreement, or power of attorney, execute- in lieu of and in substitution of said original power of attorney, in consideration of the facts above stated, witnesseth:

That I, Jennie M. Mettler, the present owner of said policies, hereby ratify my said employment of said attorneys, and do now employ them, the said Alexander, Clark & Thompson and W. L. Hall; and it is understood and agreed that the said Alexander, Clark & Thompson and W. L. Hall, will continue to prosecute said suit, as in their judgment they may deem proper, and in consideration of the legal services rendered, and to be rendered in the collection of said policies, by suit or otherwise, they are to receive and are hereby given, transferred, assigned and delivered one third interest of, in and to said policies

and claim against said life insurance association, and the further sum of $2500.00 thereof, that is, should the principal, accrued interest and 12 per cent. statutory damages, if allowed, amount to $18,000.00 and be collected, they would own and should receive $8500.00 thereof; as well as the attorneys' fees provided for by the statutes of Texas in such cases; and should a less amount on account of principal, interest and said 12 per cent. damages be collected by suit or compromise, they would own and should receive their pro rata part thereof, according to their interest aforesaid, as well as said attorneys' fees, if any, collected; it being understood that on account of the decision in G. C. & S. F. Railway Company *vs.* Ellis, 165 U. S. 150, it is very probable that a recovery of the ten per cent.
296 attorneys' fees, as well as of the 12 per cent. damages, cannot be enforced.

It is further understood and agreed that if said suit is compromised, it must be with the consent of said Mrs. Jennie M. Mettler and of Alexander, Clark & Thompson and W. L. Hall.

It is further understood that the said Alexander, Clark & Thompson and W. L. Hall, may employ such associate attorneys to aid them in the prosecution of said suit as they may deem necessary, it being agreed that they are to pay such attorneys themselves, and the said Mrs. Mettler is not to be liable for attorneys' fees other than provided for above.

Witness our hands, this the 10th day of June, 1899.

MRS. JENNIE M. METTLER.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, W. H. Mansfield, a notary public in and for the county of Dallas, State of Texas, on this day personally appeared Mrs. Jennie M. Mettler, a *femme sole*, known to *be* to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and considerations therein expressed.

Given under my hand and official seal, this the 10th day of June, A. D. 1899.

W. H. MANSFIELD,
[SEAL.] Notary Public, Dallas County, Texas.

DALLAS, May 29th, 1902.

For value received, we, and each of us, hereby transfer & assign our right & interest in the above & foregoing contract and in and to the judgment rendered in said cause, to W. H. Clark.

W. M. ALEXANDER.
WM. THOMPSON.
W. L. HALL.

The foregoing has the following endorsements, to-wit:—
297 D. Mrs. Jennie M. Mettler to Alexander, Clark & Thompson. Power of attorney. Filed June 3d, 1902. J. H. Finks, clerk.

Power of Attorney.

Filed June 3rd, 1902.

THE STATE OF TEXAS, }
County of Dallas. }

This agreement witnesseth: Whereas Wm. A. Hunter of Pecos, Texas, insured his life on the 31st day of October, 1896, with the Fidelity Mutual Life Association of Philadelphia, Mrs. Jennie M. Mettler being the beneficiary of said insurance, the same being in three policies of $5000.00 each, numbered respectively D73372, D-73373 and D-73374; and

Whereas, said Wm. A. Hunter departed this life on or about the 3rd day of December, 1896, being drowned in the Pecos river near what is known as "Texas Bend" of the river, above Pecos, at which place he camped, driving from Pecos to Mentone in Loving county; and

Whereas, said insurance company did, on or about the 17th day of May, 1897, by its certain letter written by its president, L. G. Fouse, dated May 17th, 1897, refuse to pay said policies;

The premises considered, I, the said Mrs. Jennie M. Mettler, a *femme sole*, of Pecos, Reeves county, Texas, hereby employ Alexander, Clark & Hall of Dallas, Texas, to institute and prosecute suit against said insurance company upon said policies, I being the owner and holder thereof, in such court as they may deem advisable.

It is understood that said Alexander, Clark & Hall will institute and prosecute said suit for a contingent fee of one-third of the amount recovered upon said policies.

It is further understood and agreed that should any proposition of compromise be made in the premises, that the same is to be submitted by Alexander, Clark & Hall to said Mrs. Jennie M. Mettler before the same is accepted; that is, the said Mrs.
298 Mettler is to sanction and authorize any compromise made.

It is understood and agreed that for and in consideration of the legal services rendered, and to be rendered, by the said Alexander, Clark & Hall, this instrument conveys to the said Alexander, Clark & Hall an undivided one-third interest in said policies.

Witness my hand, this the 27th day of October A. D. 1897.

JENNIE M. METTLER.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, W. H. Mansfield, a notary public in and for the county of Dallas, State of Texas, on this day personally appeared Mrs.

Jennie M. Mettler, a *femme sole*, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this the 27th day of October, A. D. 1897.

[SEAL.] W. H. MANSFIELD,
Notary Public, Dallas County, Texas.

DALLAS, May 29th, 1902.

For value received, we, and each of us, hereby transfer & assign our right & interest in the above contract, including court costs & other expenses paid by us, to W. H Clark.

W. M. ALEXANDER.
WM. L. HALL.

The foregoing has the following endorsement, to-wit:
E. Mrs. Jennie M. Mettler to Alexander, Clark & Hall. Power of attorney. Filed June 3d, 1902. J. H. Finks, clerk.

"F."

UNITED STATES SENATE,
WASHINGTON, D. C., May 8, 1902.

290 Mr. C. A. Rasbury, Dallas, Texas.

DEAR RASBURY: The insurance case against the Fidelity Mutual Life Association about which I wrote you some time ago, was affirmed on Monday, and in accordance with my agreement with Clark, my fee is $1000 and is due when the judgment is paid. As I have heretofore written you, I will be glad if you will do me the kindness to collect this $1,000 for me, as Clark wires me today that the judgment will be paid in Dallas. He also owes me $26.00 for printing briefs, which please collect also and deposit the whole sum in the National Exchange Bank of Dallas to my credit, and notify me when it is done.

Very truly yours, C. A. CULBERSON.

G.

Mr. J. H. Finks, clerk U. S. court, Dallas, Texas.

DEAR SIR: The def't's attorneys in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ins. Ass'n inform me that the amount of judgment will be paid into court within a few days. I have an interest of $1,500.00 in said judgment, which please remit to me at Fort Worth as soon as the money is paid over to you. Attached is a letter from W. H. Clark, which explains itself.

Yours t'ly, M. A. SPOONTS.

H.

William H. Clark, attorney and counselor at law, North Texas Bank building.

DALLAS, TEXAS, May 26, 1902.

300 Hon. M. A. Spoonts, Ft. Worth, Texas.

MY DEAR SPOONTS: The Mettler judgment will be paid off in a few days. It will be paid to the clerk & I will have him send you a check for your part of the recovery, to-wit: fifteen hundred dollars ($1500.00).

Your friend, W. H. CLARK.

The foregoing instrument has the following endorsements, to-wit: Jennie Mettler case. Spoonts. Filed June 1, 1902. J. H. Finks, clerk.

I.

J. H. Finks, Clerk United States Courts, Northern District of Texas.

No. 1525. DALLAS, TEXAS, June 3, 1902.

Received of J. H. Finks, clerk, $1540.24 the sum of one thousand five hundred forty and 24/100 dollars on account of judgment in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

PHILLIPS INVEST. CO.,
By ALEXANDER & THOMPSON.

(1)

J.

J. H. Finks, Clerk United States Courts, Northern District of Texas.

No. 1530. DALLAS, TEXAS, June 3, 1902.

Received of J. H. Finks, clerk, $11,616.00, the sum of eleven thousand six hundred sixteen dollars, on account of judgment in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

MRS. JENNIE M. METTLER,
By W. H. CLERK,
Her Attorney of Record.

(5)

301 K.

J. H. Finks, Clerk United States Courts, Northern District of Texas.

No. 1529. DALLAS, TEXAS, June 3, 1902.

Received of J. H. Finks, clerk, $8346.00—the sum of eight thousand three hundred forty-six $\frac{00}{100}$ dollars, on account of judgment in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

W. H. CLARK.

(4)

(2) L.

J. H. Finks, Clerk United States Courts, Northern District of Texas.

No. 1527. DALLAS, TEXAS, June 3, 1902.

Received of J. H. Finks, clerk—$1500.00—the sum of fifteen hundred $\frac{00}{100}$ dollars, on account of judgment in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

Thanks.

M. A. SPOONTS.

M.

J. H. Finks, Clerk United States Courts, Northern District of Texas.

No. 1528. DALLAS, TEXAS, June 3, 1902.

Received of J. H. Finks—$1026.00—the sum of one thousand twenty-six 00/100 dollars, on account of judgment in case of Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

(3)

C. A. CULBERSON,
By C. A. RASBURY.

302 and marked "Exhibit M."

J. H. FINKS.

I do further certify that the testimony so given by the said witness J. H. Finks, was reduced to typewriting by me as the same appears at large above, and afterwards was read over by the said witness and was signed by the said witness in my presence and that of such of the parties and counsel as were in attendance; the genuine signature of said witness appearing above.

I do further certify that the papers hereto attached and marked Exhibits A. to M., inclusive, are true and correct and carefully compared copies made by me, of the original papers, concerning which the witness testified as shown by his answers above.

And thereupon the plaintiff called as a witness L. A. SMITH, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness L. A. Smith.

Direct examination by Mr. LOCKE:

Q. State your name and place of residence?
A. L. A. Smith; Dallas, Texas.
Q. What official connection, if any, do you sustain to the American national bank?
A. I am assistant cashier of the American national bank.
Q. What other duties do you perform?
A. I also perform the duties of paying teller.
Q. How long have you been paying teller of the bank?
A. The past fourteen years.

303 Q. Please state whether through the first few days of the month of June, 1902, the circuit court of the United States for the northern district of Texas at Dallas had an account with your bank?
A. It did.
Q. Please state the amount of the balance standing to the credit of said court on the books of your bank at the close of business June 2nd, 1902.
A. On June 2nd, 1902, there stood to the credit of the United — circuit court $912.68.
Q. What deposit was made on the 3rd day of June, 1902?
A. Our ledger shows a deposit made June 3, 1902, of $24,028.25.
Q. Please examine that paper and state whether the deposit made June 3, 1902, was made by that check?
A. Yes, I identify this check as the voucher that went to the credit of the United States circuit court at Dallas on that date.

It is agreed that this is the same check described in the testimony of the witness J. E. Gilbert for $24,028.25, drawn by the plaintiff company.

Q. Was the check ever paid to your bank?
A. Yes, sir.
Q. When you received it what did you do with it?
A. We sent this to the Farmers & Mechanics National Bank of Philadelphia for our credit, and it was duly credited to our account by them.
Q. No reclamation was ever made by that bank for the check having been dishonored?
A. Not to my knowledge; I can answer that "no."
Q. Have you with you your original check, No. 424, drawn on

the American national bank by J. H. Finks, as clerk of the U. S. circuit court?

A. Yes, sir.

Q. Can you attach that original to your deposition?

A. No, sir.

Q. For what reason?

304 A. For the reason that this is the property—under the jurisdiction as I take it, of the Attorney General of the United States, and we have no authority to deliver this voucher to any person.

Q. Your bank is designated United States depository?

A. Yes, sir.

Q. Under the rules of the designated depository you are required to keep such checks?

A. Yes, sir.

Q. In order that an inspector for the Government may inspect them at any time?

A. Yes, sir, we are not authorized to give them up to any person.

Q. This check 424, please examine it; by whom, and in whose favor is that drawn. Was that check 424 paid by your bank?

A. Yes, sir.

Q. When and to whom?

A. We paid that to the City National Bank of Dallas through the clearing house, on June 16, 1902.

Copy of check No. 424 will be attached hereto and marked "Exhibit A."

Q. Check 425, have you that?

A. Yes, sir.

Q. Was that check paid by your bank?

A. Yes, sir. That is a check for $1500 payable to the order of M. A. Spoonts; it was sent to us by the Forth Worth National Bank of Forth Worth, Texas, in their letter of June 5, and we credited it to their account on our books June 6 and so advised them.

Copy of check 425 will be attached to your deposition and marked "Exhibit B."

Q. Check No. 426, was that check paid by your bank, if so, to whom?

305 A. Paid to C. A. Culberson, $1026; we paid that through the clearing house to the National Exchange bank, on June 12, 1902.

Copy of check No. 426 will be attached to your deposition and marked "Exhibit C."

Q. Check No. 427; was that paid, if so, to whom and where?

A. It is payable to W. H. Clark, $8,346, paid by us to W. H. Clark, attorney; paid on June 4, 1902.

Copy of check No. 427, with all its endorsements will be attached to your deposition marked "Exhibit D."

Q. Check No. 428; was it paid, and if so, to whom?

A. Pay to the order of W. H. Clark, attorney of record for Mrs. Jennie M. Mettler, $11,616. We paid that to W. H. Clark as attorney of record, endorsed as such; paid that to him June 4, 1902.

Copy of check No. 428, with its endorsements, will be attached to your deposition marked "Exhibit E."

Q. These two amounts that were paid to W. H. Clark on checks 427 and 428, were paid in what manner?

A. The bank paid him this money and then he buys cashier's checks the same day, amounting to $19,616, and I take it that he took $346 of the money with him.

Q. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully in your answer?

A. No, sir, I don't know of anything further that I can say with reference to this transaction.

Cross-examined by Mr. W. M. ALEXANDER:

Q. Mr. Smith, relative to this draft of $24.024.25, bearing date May 29, 1902, which you say was accepted by your bank from the clerk of the United States court as a deposit; did you have any instructions from the officers of the bank relative to accepting
306 that draft as a deposit?

A. No, sir.

Q. Had you had any dealings with the Fidelity Mutual Life Insurance Company, or your bank, previous to this?

A. Yes, oh yes.

Q. You accepted that as cash?

A. Yes, sir.

Q. Philadelphia exchange?

A. Yes, sir.

Q. Know whether the thing was a solvent concern?

A. We accepted that on the credit of the United States circuit court, just like we would take a piece of paper from you; we would not know anything about its face; we give credit for this check upon its credit; we do not cash it on the face of the check; it might transpire that this signature was a forgery; we do not question these things; it is the man's name on the back of it that we regard; if that check was not paid and we go back on the circuit court at Dallas, we would get our money without a question of doubt. You asked if we had any business with the Fidelity Mutual previous to this transaction; I believe at that time they were doing busines

with us, that is, Mr. A. J. Brown was. The company was established with us, but we handled that check just as if it was signed John Smith.

Q. Is it not a fact that it is customary when you receive large drafts of that kind, you receive them for collection?

A. No, sir.

Q. You receive it as cash?

A. Yes, sir.

Q. This is necessarily based upon the credit you give to the one who endorses it?

A. Yes, entirely so.

Q. You give Mr. Finks credit for $24,000.00?

307 A. No, sir, we give the circuit court at Dallas credit; Mr. Finks' name was not identified.

Q. J. H. Finks, clerk of the United States circuit court at Dallas endorsed it?

A. Yes, sir.

Q. You didn't have the endorsement of the United States circuit court?

A. Yes, that is the endorsement; that is the only endorsement we recognize.

Q. You don't require the signature of the United States district judge?

A. No, sir.

Q. You stated that you had no conversation with any of the officers of the bank. Had you any conversation with Mr. Brown, the State agent of the Fidelity Mutual Life Insurance Company?

A. No, sir.

Q. Do you know when that draft was paid?

A. Yes.

Q. When? Independent of the recital on the face of it?

A. No, I would have no way of knowing unless I went to the ledger.

Q. When was it paid?

A. It was paid on the date we give Mr. Finks credit for it—June 3rd, 1902.

Q. When was it paid to you?

A. We put it to the credit of the United States circuit court June 3rd.

Q. When was it paid at Philadelphia?

A. I have no record of that; I can safely say within three days; it generally takes three days to go to Philadelphia.

Q. It was paid to your correspondent in Philadelphia?

A. Yes, credited to our account with them, and so advised.

308 They advised us on receipt of our letters.

Q. The first draft that was given by Mr. Finks, check No. 424, to the order of the Phillips Investment Company of Kansas City, Mo.—who paid that to the Phillips Investment Company?

A. I can only answer that by looking at the endorsement on the

back; I would say that the Phillips Investment Company deposited it with the Bank of Montreal, at Chicago; they evidently sent it to the Fourth Street National Bank of Philadelphia; that is the way these endorsements run; the Fourth Street national bank sent it to the City national bank with their endorsement—blanket endorsement, "Pay to any bank or banker," to their account, under date of June 12; it arrived at Dallas June 16, and paid through the clearing house by us.

Q. You didn't read all the endorsements there, Mr. Smith; don't this say "Endorsement guaranteed"?

A. I only answered your question.

Q. Don't that say "Endorsement guaranteed to pay any bank or banker, or order, June 12, 1902, Fourth Street national bank, Philadelphia"?

A. Yes, sir.

Q. Don't the Fourth Street National Bank of Philadelphia guarantee the endorsement by their stamp?

A. Yes, sir.

Q. You have been in the banking business many years?

A. Yes, sir.

Q. The sending of this paper to Philadelphia with the endorsements we find on that draft by the Fourth Street National Bank of Philadelphia—what did that evidence in banking?

A. It shows that the draft came through that bank for collection; evidently the bank at Chicago sent it to Philadelphia, and the Philadelphia bank sent it to the City national bank at Dallas; that is all there is about it; I never had the question come up, but I take it that endorsement would only protect us in case of
309 forgery—no other liability outside of that; that it was endorsed by an authorized officer of the company.

Q. That is a negotiable paper?

A. I don't know——

Plaintiff objected.

A. I will say that it is not a negotiable paper; nobody could buy that paper.

Q. What do you understand by negotiable paper?

A. Paper anybody could buy and sell for a consideration.

Q. Didn't you say a moment ago you didn't know whether it was negotiable or not?

A. I will say that yet in this particular case.

Q. You don't know whether it is negotiable or not?

A. I would not say in this particular case.

Q. This was paid to the City national bank, or by the City national bank?

A. Both.

Q. Both paid to and by?

A. Yes, paid by us to the City national bank, and paid by the City national bank to the Philadelphia bank.

Q. When was that payment made?

A. The date of their stamp there is June 16; our stamp is June 16, clearing house.

Q. What was the status of the account of the United States circuit court on the 15th of June, 1902?

A. I am not prepared to state, other than that it had the money to their credit; I have never seen that account overdrawn yet; they always had money to their credit when they issued a check.

Q. Will you ascertain and furnish the amount of the account of the United States circuit court at Dallas for the northern district of Texas, on June 15th, 1902?

A. Yes, sir, I can.

310 Q. I wish you would furnish that to Mr. Parker—at the close of business on June 15th, 1902.

The amount of balance to the credit of the United States circuit court for the northern district of Texas, at Dallas, at the close of business June 15, 1902, as reported to the examiner by the witness Smith, was $3667.93.

A. I can safely say it had money there.

Q. And a good deal more too?

A. Yes.

Q. Always had a balance?

A. Yes, sir.

Q. Sometimes the account runs up to $50,000?

A. I can't say that it does.

Q. During the time of this receivership of the Standard Light & Power Company didn't it run $100,000?

A. No, sir; I don't think so.

Q. Mr. Finks had only one account as clerk of the United States circuit court with you?

A. He had several.

Q. How much was the account in the Mettler case?

A. I don't know anything about the Mettler account. The United States circuit court has three or four accounts.

Q. Tell us what they are?

A. United States circuit court at Dallas; United States circuit court at Fort Worth; United States circuit court at Abilene; United States circuit court at San Angelo, and I believe at that time, United States circuit court at Waco.

Q. Has he never had any account of any case with you—any particular case or suit, or cause, pending in the court?

A. No, sir.

Q. These checks were not against any fund, for instances the Jennie M. Mettler fund?

A. No, sir.

311 Q. It was against the account of the United States circuit court?

A. Yes, sir; for instance, it had $912.68 to its credit; I don't know what that was composed of.

Q. You don't know what this was composed of?
A. No, sir.
Q. It went to the general fund?
A. Yes, sir, $24,028.25 into the $912.68, and they were merged together.
Q. They were all mixed together?
A. Yes, it was all paid out of the fund of the United States circuit court at Dallas; I don't know what the other fund was composed of.
Q. You know you didn't get any money on this $24,000 check?
A. Yes we did.
Q. Was it gold or greenback?
A. It was money; it was money subject to our check.
Q. Did you see the money? Is it not a fact that you got credit for that amount and you don't know whether it was paid in money or how it was paid?
A. Yes, it was credited to our account in Philadelphia and we checked against it.
Q. You don't know whether paid in money or by check; you don't know how it was handled at that end of the line?
A. No, I know we got credit——
Q. If you will answer my question; do you know whether or not the money was actually paid in cash to your correspondent in Philadelphia, or whether they took credit for the amount?
A. If it was handled there like we handle such items in Dallas, I would say they got credit in the clearing house, according to the way that check is endorsed. I will tell you there are times when we get items like that we won't put in the clearing house; we go down and get the cash; I have handled lots of checks that
312 way; in some instances when I get a check for ten or fifteen thousand dollars I don't wait for the clearing house, I go right down and collect it over the counter.
Q. Is there anything about this item suggesting that they might have done that?
A. If they handled it like we do, I should imagine they put it through the clearing house and got credit that way.
Q. In conclusion, with reference to this $1540 check, and with reference to these other checks, the Culberson check, the Spoonts check and the Clark checks, they were paid out of that account to the credit of the United States circuit court at Dallas?
A. Yes, sir.
Q. That was after this check had been put in there and merged in that fund?
A. Yes, after that had been credited to that account.
Q. It was then merged in the general account?
A. Credited to that account, yes sir. It had to go to the credit of the circuit court at Dallas before we could pay these checks.
Q. The balance to the credit of the United States circuit court at Dallas on the evening of June 3 was how much?
A. Add $912.68 to that deposit.

Q. There were other items—checks and deposits—between that and the 15th?

A. Yes sir, probably so, they are always debiting and crediting these accounts.

L. A. SMITH.

I do further certify that the testimony so given by the said witness, L. A. Smith, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

313 I do further certify that each of the Exhibits A to E, inclusive, is a true, correct and carefully compared copy made by me, of the original instrument of which it purports to be a copy and concerning which the testimony of the witness was given as shown at large above.

314 (Countersigned)
EDWARD R. MEEK,
Judge of said Court.

Original.

Registry Voucher No. —, Check No. 428.

In the Circuit Court of the United States of America, at Dallas, Texas.

DALLAS, TEXAS, June 3, A. D. 1902.

In cause No. 2118 of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of W. H. Clark, att'y of record for Mrs. Jennie M. Mettler, to the use of Jennie M. Mettler, on account of judgment, the sum of eleven thousand six hundred sixteen dollars, out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court at Dallas, Texas.

$11,616.00.

J. H. FINKS,
Clerk of said Court,
By —— ——, Deputy.

Indorsed: W. H. Clark, att'y of record for Mrs. Jennie M. Mettler.

Stamped across face: Paid June 4, 1904; American national bank, Dallas, Texas.

315 (Countersigned)
EDWARD R. MEEK,
Judge of said court.

Original.

Registry Voucher No. —, Check No. 427.

In the Circuit Court of the United States of America, at Dallas, Texas.

DALLAS, TEXAS, June 3rd, A. D. 1902.

In cause No. — of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of W. H. Clark, attorney, to the use of himself, on account of judgment, the sum of eight thousand three hundred forty-six dollars, out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court at Dallas, Texas.

$8,346.00.

J. H. FINKS,
Clerk of said Court,
By —— ——, Deputy.

Stamped across the face: Paid June 4, 1902; American national bank, Dallas, Texas.

Endorsed: W. H. Clark, att'y.

316 (Countersigned)
EDWARD R. MEEK,
Judge of said Court.

Original.

Registry Voucher No. —, Check No. 426.

In the Circuit Court of the United States of America, at Dallas, Texas.

DALLAS, TEXAS, June 3, A. D. 1902.

In cause No. 2118, of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of C. A. Culberson, to the use of himself, on account of judgment, the sum of one thousand twenty-six dollars out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court, at Dallas, Texas.
$1026.00.

J. H. FINKS,
Clerk of said Court,
By —— ——, Deputy.

Stamped across the face: Paid June 12, 1902; American national bank, Dallas, Texas—paying teller.
Indorsed as follows: Pay National Exchange bank, C. A. Culberson; Dallas clearinghouse, June 12, 1902; National Exchange bank, Dallas, Texas.

317 (Countersigned)
EDWARD R. MEEK,
Judge of said Court.

Original.

Registry Voucher No. —, Check No. 425.

In the Circuit Court of the United States of America, at Dallas, Texas.

DALLAS, TEXAS, June 3rd, A. D. 1902.

In cause No. 2118, of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of M. A. Spoonts, to the use of himself, on account of judgment, the sum of fifteen hundred dollars, out of the fund deposited in said cause.
Charge the same to the account of the United States circuit court, at Dallas, Texas.
$1500.00.

J. H. FINKS,
Clerk of said Court,
By —— ——, Deputy.

Stamped across the face: Paid June 6, 1902; American national bank, Dallas, Texas.
Indorsed as follows: M. A. Spoonts. Pay to the order of any bank or banker; Fort Worth national bank, Fort Worth, Texas; N. Harding, cashier. Jun- 5.

318 (Countersigned)
EDWARD R. MEEK,
Judge of said Court.

Original.

Registry Voucher No. —, Check No. 424.

In the Circuit Court of the United States of America, at Dallas, Texas.

In cause No. 2118, of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

DALLAS, TEXAS, June 3, A. D. 1902.

To American National Bank of Dallas:

Pay to the order of Phillips Investment Co. of Kansas City, Mo., to the use of itself, on account of judgment the sum of one thousand five hundred forth and 25/100 dollars, out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court, at Dallas, Texas.

$1540.25.

J. H. FINKS,
Clerk of said Court,
By —— ——, Deputy.

Dallas clearing house, June 16, 1902.

Stamped across face: Paid June 16, 1902; American national bank, Dallas, Texas—paying teller.

Indorsed as follows: Pay to the order of the Bank of Montreal—Phillips Investment Co., by Albert Twing, president. Pay to the order of any bank or banker—Bank of Montreal, Chicago, J. W. de C. O'Grady, manager; endorsement guaranteed; pay any bank or banker, or order, June 12, 1902; the Fourth Street Nat'n'l Bank of Philadelphia, E. F. Shonbacker, cashier. Paid—City national bank.

319 Thereupon the plaintiff called as a witness JOHN H. STUART, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness John H. Stuart.

Direct examination by Mr. LOCKE:

Q. State your name, age and place of residence?

A. My name is John H. Stuart, am 44 years old, and at present am on the road out of Will's Point, working out of Dallas.

Q. Your occupation is that of travelling for the International Harvester Company?

A. Yes, sir.

Q. Were you acquainted with one William H. Hunter, who formerly lived at Quanah, and before that at Alvarado?

A. I didn't understand that his name was William; I understood his name was Walter.

Q. Walter A. Hunter?

A. Yes, sir, W. A. Hunter is the way he signed it. I knew W. A. Hunter.

Q. Where did you become acquainted with him?

A. In Alvarado, Johnson county, Texas; I think it was in the fall of 1886, somewhere about 1886.

Q. You knew him there about how long a time?

A. I don't remember just exactly how long I did know him; I knew him quite a little bit; he worked there quite a while for A. M. Morgan.

Q. After that where did you know him?

A. In Quanah, Texas, Hardeman county.

Q. What was his occupation there?

A. At first he was in the land business there with some others; I don't remember the names. He was in the land business
320 and then he was working in the court house in the county clerk's office; the county and district clerk's office is together. He was working there, that was in 1890 and 1891. I met him first in the country as a land agent, in 1890, bought some stuff from him.

Q. After you knew him in Quanah, did you know him anywhere else?

A. Yes, I knew him in Dallas for over a year.

Q. When?

A. In 1895.

A. As far as I ever knew he was not doing anything; he would bob up down there at the office; I was working for Aultman and Miller; he would come up there to the room and stay with me and I never really knew that he done anything; my understanding is he was playing the races down at Coney island for about a year.

COUNSEL FOR THE DEFENDANTS: Unless you know I object.

A. I don't know.

Mr. ALEXANDER: I ask that that be excluded.

Mr. LOCKE: Do you know of any occupation he had?

A. No, sir, not a thing; I only met him as I say; I was well acquainted with him and he used to come to the room and stay there half the night; I don't know but what he may have stayed all night; I would meet him every few days.

Q. Do you know what his financial condition was?

A. No, not positive; I know that he did have some money up in that country; he let out some money to his brother; I didn't see

the papers, but it was my understanding he let out money to parties and lost it; he did have some money there; he boarded with me.

Q. These losses had been sustained before you knew him here in Dallas?

A. Yes, sir.

Q. What was his financial condition in 1895?

A. I can't tell you; I knew him—just met him; he never
321 said he had any money or didn't have any; I don't know a thing in the world about that.

Q. Do you remember the occurrence of his disappearance from Pecos in December, 1896?

A. Yes, I saw that in the papers.

Q. How long had it been before that since you saw him last?

A. It had been quite a while; I had lost track of him pretty well. That was the first I had known of him for some bit.

Q. State whether you have seen him since his disappearance from Pecos in 1896?

A. Yes, I saw him on the platform of the Texas & Pacific depot down here in November, when he was brought from Alabama in the custody of the sheriff; I saw him alight from the train; he stopped and asked me how everybody was and called me by my name; he went on to the courthouse and I went to the office.

Q. The man you saw down at the depot in November, 1903, was the same man you knew in Alvarado and Quanah?

A. Yes, sir.

Q. Did you know his sister?

A. Yes, sir.

Q. What was her name?

A. I knew her as Mrs. Mettler; I think her name was Jennie. I knew her out at Quanah. I never saw her after that—after they went to Pecos.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I do not.

Cross-examined by Mr. ALEXANDER:

Q. You are acquainted with Andrew J. Brown?

322 A. Yes, sir, I have known him ever since I was eight or ten years old, I guess.

Q. You and Brown both knew Hunter in Alvarado?

A. I suppose Mr. Brown knew him; he was there; he ought to have known him.

Q. Where have you been living since 1900?

A. My family has been in Quanah and I have been traveling all over Texas and Louisiana.

Q. You have been acquainted with Mr. Brown all this time?
A. Yes, sir.
Q. He talked to you about the Hunter case?
A. No, sir, except the time they wanted me to go down to the train to identify him; that is the only time I ever had any talk with him.
Q. I believe you stated that he had the reputation of paying his debts?
A. He did all the time he was at Quanah.

JOHN H. STUART.

I do further certify that the testimony so given by the said witness was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness, and was signed by the said witness in my presence and in that of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

Thereupon the plaintiff called as a witness ANDREW J. BROWN, who having been by me carefully examined and duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, was questioned orally by said counsel and gave answers and testimony as follows:

Testimony of the Witness Andrew J. Brown.

Direct examination by Mr. LOCKE:

323 Q. State your name and place of residence.
A. My name is A. J. Brown; I reside in Dallas, Texas.
Q. What business relation, if any, do you sustain to The Fidelity Mutual Life Insurance Company, the plaintiff in this case?
A. I have the general management for that company for the State of Texas, and have had for nearly fifteen years.
Q. Has that company been under the same name all the time?
A. No, sir..
Q. What was its name before it assumed its present name?
A. The name of it was the Fidelity Mutual Life Association up to about 1899, I think, somewhere about 1899; it had its charter amended and the name changed to its present name.
Q. What is the corporate home of the company—where is its home office?
A. Philadelphia, Pa.
Q. You had the same connection with it under its former name as under its present name?
A. Yes, sir.
Q. Please state whether you were acquainted with William A. Hunter?
A. Yes, I knew him.
Q. When and where?

A. First, at Alvarado, Johnson county.

Q. What was he doing there?

A. He worked in the grocery store of A. M. Morgan, and I think was the book-keeper and cashier of the grocery store.

Q. That was about when?

A. I can't say definitely, but somewhere about 1886 or 1887

Q. Were you acquainted with him any place after that?

A. Yes, I knew him at Quanah.

Q. What was he doing there?

A. When I saw him he told me he was in the real estate business.

324 Q. Did you see him at any time after that in the fall of 1896?

A. Yes, sir.

Q. Where?

A. In my office, and for the next eight or ten days at different places in Dallas.

Q. The first time you saw him here was in your office?

A. I am not sure about that; I may have met him on the street before he came to my office.

Mr. ALEXANDER: In view of the fact that Capt. Brown testified on the former trial of this case, and his testimony is included in the bill of exceptions which is in the record, we object to any matter set forth therein, as uselessly encumbering the record, and ask that this be expunged or charged to the plaintiff.

Mr. LOCKE: Please state what took place between you and William A. Hunter on the occasion when you met him in your office? State when that was?

A. He came into my office on or about the 26th day of October, 1896. I hadn't seen him previous to his visit to Dallas on that occasion since I met him in Quanah; we engaged in a general conversation as men usually do under such circumstances, and finally we got to talking about life insurance; we discussed the business of life insurance for some little time, and he remarked that he had been thinking about taking some insurance and told me his reasons for wanting the insurance; he told me that he and his brother, Mr. Mettler, whom I also met at Quanah, went from Quanah out to Pecos city and there bought up a large body of land—Pecos Valley land—and then got up an irrigation scheme, organized a company, I think he said, with the hope of putting that land under a system of irrigation; and had they succeeded they would have made a large lot of money out of it, but his brother in law had in the mean time died, the irrigation scheme fell through and left a widowed sister on his hands with this indebtedness on this land, and if he died his

325 sister would lose what they had put into the land; that was the reason he gave me for wanting the insurance, and of course I gave him rates on the different kinds of policies, from the cheapest, and finally he told me he would take fifteen thousand on

the ten-year term plan; then I wrote his application, telephoned for a doctor, had him examined and forwarded the application to the home office.

Q. Did he pay the premium on the policies at that time?

A. He paid the semi-annual premium on the policies.

Q. Do you remember how much that amounted to?

A. My recollection is that the semi-annual payment was between $98 and $99; I don't remember exactly; it was right about that.

Q. Do you remember how he made the payment?

A. He made the payment by giving me a check on the City National Bank of Dallas.

Q. Refresh your memory as to the amount of these premiums and get the exact amount? (Hands witness the policies.)

A. It seems here it amounted to $97.65, it was $32.65 on each policy, and there were three policies. $97.65 was the amount he paid, I presume, I don't see how it could be different. I testified it was right about $98.00.

Q. What did he say was his occupation at that time?

A. I think he said real estate and farming. I wrote it down just what he said in the application; I can tell by referring to that. (Refers to it.) Yes, real estate and farming.

Q. You say you forwarded the application to the home office at Philadelphia?

A. Yes, sir.

Q. Did it accept the application and issue the policies?

A. Yes.

Q. Look at the papers you have there and state whether they are the policies or not?

A. Yes, these are the policies. Must have been, because there
326 were three policies identically like these; I have no marks of identification by which I can swear to them positively; I am pretty sure they are the policies.

Q. Look at them and see whether they bear the genuine signatures of the officers of the company?

A. Yes, sir, this is the president's signature, and this is the treasurer's signature and this is the secretary's signature, and these are receipts signed by my cashier, Mr. B. W. Bryant.

Q. State to the examiner the number and amount and date of each of these policies, for the purpose of identification?

A. These policies of $5000.00 each, numbered as follows: D73372, D73373 and D73374, of date October 31, 1896, each issued on the life of William A. Hunter, made payable in event of his death to his sister, Jennie M. Mettler.

Q. Please state whether or not these are the policies upon which Mrs. Jennie M. Mettler brought her suit No. 2118 against the Fidelity Mutual Life Association of Philadelphia and recovered judgment in 1900?

A. Yes, sir, they are.

Q. You say you saw Hunter about town for a few days after your first interview?

A. Yes, sir.

Q. When did you deliver the policies to him?

A. I delivered the policies to him in person in the office, either the 6th or 7th, I think it was the 7th, of November, 1896.

Q. Did you see Hunter after you delivered the policies to him?

A. No, sir, not until I saw him in Birmingham.

Q. That was the 6th or 7th of November, 1896?

A. Yes, sir.

Q. When next did you see William A. Hunter?

A. I saw him next in jail in Birmingham, Alabama. I can't give the date; it was about the last of April or the first of
327 May; that was the first I saw of him after I delivered the policies.

Q. 1903?

A. Yes, sir, in jail at Birmingham.

Q. Who was with you at the time you saw him there in jail?

A. Mr. H. B. Taylor.

Q. Did you have any conversation with Hunter at that time?

A. No, it was not a regular conversation.

Q. Did he recognize you and call you by your name, or not?

A. Yes, sir, I can give you just what he said: When we entered the jail door—the door of the reception room of the jail——

Mr. ALEXANDER: I want to interpose an objection; the statements made by him would not be effective, or admissible against the defendants or either of them.

Mr. LOCKE:

Q. I don't care for the conversation, except that he recognized you and called your name?

A. Yes, he recognized me and called me by name twice; I stated that I didn't hold any regular conversation with him; I don't want to be misunderstood; the idea I intended to convey was that we didn't have a regular conversation, because he would not converse with me; he did call my name twice.

Q. When next did you see Mr. Hunter?

A. Isaw him on the morning that Mr. Stuart and I went over here—the 25th of November last, I think, when Sheriff Johnson arrived at the city depot on the Texas & Pacific with him.

Q. You and Mr. John H. Stuart who just testified?

A. Yes, sir, we went down to the station together; I went with Mr. Stuart; Mr. Stuart knew Hunter and wanted to see if he recognized him; we went together.

Q. And when next did you see him?

A. The next time I saw him was the time he came here from Birmingham after he gave bond and went back; he came back

here to his trial—I believe it was the first of March—the time
328 his trial was set for and then postponed and he went back to Birmingham; while he was here on that trip I saw him on the streets of Dallas, then when the trial came up after that I saw him in the court house for several days during the trial.

Q. Please state whether or not there is any doubt in your mind as to the identity of the man you saw at Birmingham and here in 1903 and 1904 and the man who made application through you to the plaintiff company for insurance?

A. None whatever.

Q. Who was in charge of the Texas State office of the Fidelity Mutual Life Insurance Company of Philadelphia and the Fidelity Mutual Life Association of Philadelphia, as it was then called, in the winter of 1896 and 1897?

A. I was.

Q. Please state whether you did or did not at any time in the early part of 1897, send or cause to be sent to R. C. Milliken or to any other person, a telegram or letter or communication of any kind to the effect that said William A. Hunter was then being taken or about to be taken to Pecos city?

A. I never sent such a telegram, neither did I ever send such a letter.

Q. Did you ever authorize any one else to do so?

A. I did not.

Q. Did you ever have any knowledge of such a telegram having been sent at the time?

A. No, sir.

Q. Knew nothing about the sending of such telegram or communication?

A. Never was any telegram sent from my office in Dallas; I only heard of a telegram that came from El Paso, from the other end of the line, to Pecos city. I don't know that of my own knowledge; I heard of it.

Q. No telegram of that nature was sent by you or with
329 your authority?

A. No, sir, never.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I know one circumstance which might throw some light on it; I don't know whether it would be proper or not; that was my attempt to catch on to the correspondence that I felt was going on—that I believed was going on between Mrs. Mettler, who resided in Dallas after this suit was brought, and her brother.

Mr. Locke: I know what it was, and I can say to counsel that it would be hearsay and would not be admissible.

Cross-examined by Mr. W. M. ALEXANDER:

Q. When did that come to your knowledge—that circumstance you speak of?

A. I can't give the date; it was after this suit was brought.

Q. Before the trial of this cause?

A. Yes, when she came here to Dallas and engaged as a milliner, in a millinery shop; it was then, when I found she was here, I made an attempt to try to find through her correspondence through the postoffice down here—I hoped to get something that would lead us to the whereabouts of Hunter; we were satisfied he was living and satisfied they were corresponding. I laid the matter before the post-office authorities—that is, Mr. Joyce, the assistant postmaster, and told him this scheme was being worked and that we thought the fellow was living and we would like very much to get his assistance to enable us to ascertain this man's whereabouts; I furnished him with her handwriting and I furnished him with his handwriting;
330 I made frequent visists to his office to ascertain if his clerks had found anything; on the second or third time I went to find out, Mr. Joyce told me——

Mr. ALEXANDER: I don't want any hearsay evidence; if there is any circumstances—I think it is competent to say that you pursued an inquiry and if you found any definite fact, state it.

Mr. BROWN: I never got anything to throw any light on it at all; she defeated us in the very thing I was going to tell you about.

Q. You discovered no facts?

A. No, sir, not that would lead us to his whereabouts.

Q. It is a fact Mr. Brown, is it not, that you believed from the time his death was reported that he was not dead and it was a scheme concocted to extort money?

A. Yes.

Q. When did you first have that belief?

A. The moment I read the telegram from the president on the third day of January. These policies were delivered the 7th day of November, as well as I remember. I knew nothing about Hunter here, until the January following——

Q. I thought you knew Hunter before he made this application?

A. I did; I knew nothing of him after I delivered these policies, I saw nothing of him, heard nothing of him until in the early part of January following, I received a telegram from the president of the company in about these words——

Q. When did you suspect that he was not dead?

A. The moment I read that telegram; when I got that telegram I remarked: "We are in for it; this is a fraud."

Q. You and the company acted on that idea, that it was a fraud, from the inception?

A. Yes, sir.

Q. Mr. R. C. Milliken, he was entrusted by the company to investigate and ferret out if he could, the fraud?

A. Yes, sir.

331 Q. He came to Texas for that?

A. He was already here.

Q. He was instructed by the company?

A. Yes, in that telegram.

Q. Did he ever communicate directly with the company at Philadelphia, after that?

A. Yes, I suppose so, he was at work a long time trying to find this fellow.

Q. He was at Pecos sometime; he was at Pecos and went out to the place where it is charged he disappeared?

A. Yes, sir.

Q. Investigated the Pecos river?

A. Yes, sir.

Q. Interviewed various witnesses?

A. Yes, went to El Paso——

Q. He testified on the trial in this court?

A. Yes, I think he did.

Q. You testified to all the facts you were cognizant of up to that time affecting the matter?

A. Yes, sir.

Q. It is a fact, is it not, Mr. Brown, that Hunter was released by the court of criminal appeals of Texas and discharged from the indictment under which he was held here and tried?

A. I suppose he was, it is generally believed so; I have not seen Hunter since he was convicted.

Q. You know as a matter of fact from your communication with the company that Hunter is released?

A. Yes, that is my idea.

Q. He has a suit pending in Birmingham against the company?

Plaintiff objected as irrelevant and immaterial.

Redirect examination by Mr. LOCKE:

332 Q. Mr. Milliken's communication with the company about this matter, did that occur directly or through you, after the first?

A. After Milliken got started in the case, I am pretty sure his communications were direct with the company; they may have at times written me to give him instructions, but if they did I don't remember; I think his instructions were received from that time on, direct.

Q. His work was that of a detective undertaking to ferret out the matter?

A. He was inspector for the company; his business was to inspect risks, and whenever a case that was supposed to be fraud showed up, it was his duty—his instructions were to make an investigation.

Recross-examination by Mr. ALEXANDER:

Q. Do you know whether or not Milliken lived in Birmingham, Ala.?

A. He did at one time.

Q. During what time?

A. I can't say; after he left Texas; after he worked this end for a good long while his work for the company was over in Georgia, Alabama and Mississippi, and he was part of the time in Atlanta and part of the time in Birmingham; I cannot answer that question definitely.

Q. He had pictures of Hunter on the trial of this case in this court?

A. Yes, as soon as I could get them I got the pictures for him.

Q. He had these pictures in his possession during the trial of the case.

A. Yes sir.

Q. He lived at Birmingham after that?

A. I think he lived at Birmingham after that; he might have been living at that time in Atlanta and afterwards went to Birmingham.

Q. Birmingham and Atlanta were alternately his headquarters?

A. Yes, sir.

Q. Mrs. Mettler, the beneficiary in the policies was present
333 during the trial and heard the evidence?

A. Yes, in the civil case, and testified.

Q. She heard the testimony of Milliken; she saw the pictures on the trial?

A. I don't know; she was sitting right here in the court house when the whole thing was going on; I suppose she did.

ANDREW J. BROWN.

I do further certify that the testimony so given by the said witness Andrew J. Brown, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties as were in attendance, the genuine signature of said witness appearing above.

I do further certify that the depositions of the witnesses above named have been retained in my possession until this moment, and that I am sealing the same and addressing the same to the circuit court of the United States for the northern district of Texas, at Dallas, Texas, for transmission by mail to said court.

In testimony whereof I have hereunto set my hand, at Ft. Worth, Texas, this, the 30 day of September, A. D. 1904.

G. W. PARKER,
Special Examiner.

My fee for taking this deposition..... ..... $30.40

G. W. PARKER.

Indorsed as follows: No. 597. Filed Dec. 24, 1904; J. H. Finks, clerk.

334 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES M. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } No. 597. In Equity.

I, Geo. W. Parker, who was specially appointed an examiner in the above styled cause by order of the court made August 8th, 1904, do hereby certify that at 10 o'clock in the forenoon of Monday September 30, 1904, at the rooms occupied by the United States courts, in the Federal building in Dallas, Texas; I was attended by Maurice E. Locke, of counsel for plaintiff, and by Messrs. William M. Alexander and William H. Clark of counsel for the defendants, for the purpose of examining witnesses in said cause orally in accordance with the provisions of the sixty-seventh rule in equity and other relevant rules and statutes and in pursuance of said order.

Thereupon the plaintiff called as a witness Miss NETTIE MEYER, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause was questioned orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness Nettie Meyer.

Direct examination by Mr. LOCKE:

Q. Please state your name and place of residence?
A. Miss N. Meyer, 147 William street, Dallas, Texas.
Q. In what occupation are you engaged, and where employed——
A. At present in the registry division of the Dallas postoffice.
Q. Where and in what capacity were you employed during the year 1897 and the year 1898?
A. I was in the general delivery of the Dallas postoffice.
Q. Please state whether you were acquainted with a lady whose name is now Mrs. Jennie M. Smythe, and whose name for
335 several years prior to March 1903, was Mrs. Jennie M. Mettler?
A. I only knew her through waiting on her for sometime.
Q. Did you know her by sight and name?
A. Yes sir.

Q. Please state how it was her habit to receive her mail which was addressed to her at Dallas?

A. She received it through the general delivery.

Q. Please state what if any instructions Mrs. Mettler give you personally in regard to the delivery of mail matter addressed to her.

A. She told me that unless she called for it herself not to let any one else have it, except one certain woman she said could get it; otherwise she said not to let any one have it, on a written order or not I cannot remember the woman's name.

Q. Please state whether the instructions you have mentioned ever were modified in any way by Mrs. Mettler, and if so, what modifications was made.

A. No, sir, that was her strict instructions at all times.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them or which may be material to the subject of this your examination or of the matters in question in this case? If yea, set forth the same fully and at large in your answer?

A. I don't know a thing about her except to give out her mail and the instructions she left I thought was peculiar; when this lady used to get her mail she would come and say "Mrs. Mettler is out of town" and she was saving her mail. I don't remember what this woman's name was.

I know her when I see her; she didn't get her mail there is the reason I didn't get her name.

Defendant objected to the statement of the witness that the instructions given by Mrs. Mettler were peculiar to her; that is merely her idea.

Cross-examined by Mr. CLARK:

Q. How long have you been in the postoffice?

336 A. Five years last June.

Q. You came in contact there with a great many people, did you not?

A. Yes, yes indeed.

Q. You very frequently have parties to give you instructions about mail?

A. Yes, sir.

Q. That is very common.

A. Yes, sir.

Q. Parties whose mail is put in boxes don't give you any instructions.

A. I don't know anything about that; that is a different department. In fact I don't know anything about the general delivery at present I have been out of there since May.

Q. When you were employed in the general delivery it was a

very usual and common thing for parties to give you instructions about their mail?

A. Yes sir.

Q. Was it frequently the case that parties asked you to hold their mail for them?

A. Yes, but we couldn't do that; we just held it according to the return request.

Q. Is it true they asked you to do so?

A. Yes, traveling men and all.

Q. Is it not true that you learned in your conversation with Mrs. Mettler and the lady who came for her mail that that was a lady living in East Dallas with whom Mrs. Mettler was boarding?

A. I don't remember the lady's name or anything attached to it; I didn't pay any attention to it; I know the woman, it was a business transaction with me.

Q. Was it not your understanding at the time her mail was being delivered to this lady that Mrs. Mettler boarded with her?

A. I don't know about that. We didn't enter into conversation. We are not allowed to do that.

Q. What did Mrs. Mettler do?

A. She told me she was a dress maker.

337 Q. Where did she work?

A. I don't know.

Q. Didn't she tell you that she worked at A. Harriss?

A. Yes, for sometime she did.

Q. Didn't she tell you with whom she was boarding in East Dallas?

A. No, sir she did not.

Q. Was it not a right frequent thing that others would call for mail of certain friends or people boarding or living with them—they would call and get mail?

A. No, sir, not unless they give orders.

Q. If they did give orders you could?

A. Yes sir.

Q. It was usual?

A. Yes, it was a usual occurrence.

Q. If she didn't deliver this order you would not deliver it to any one?

A. No sir, not to any one.

Q. That order was necessary in order for the mail to be delivered.

A. Yes sir.

Q. Was there any thing different in the order she gave you and others.

A. No sir, no difference at all.

Redirect examination by Mr. LOCKE:

Q. Do you recall any other case in which you were instructed not to deliver mail upon—even upon a written order from the addressee?

Defendant objected because the question is leading and suggestive of the answer.

Mr. LOCKE: Please state whether you recall any other instance, and if so, please specify the instance in which you were instructed by any person not to deliver his mail to any one else, even upon his written order.

Q. There are numerous cases, I can't recall any one case at present.

Mr. CLARK: There are numerous cases but you can't recall them.

338 A. Yes, sir.

Mr. LOCKE: You mean numerous cases in which the person instructed you to disregard their written orders?

A. Yes, sir.

Mr. CLARK: You don't mean disregard their own written orders; but orders to you purporting to be?

A. Yes, sir, we don't know whether the order is from them or not.

NETTIE MEYER.

I do further certify that the testimony so given by the said witness Miss Nettie Meyer, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of such of the parties or counsel as were in attendance; the genuine signature of the witness appearing above.

Thereupon the plaintiff called as a witness R. C. MILLIKEN, who having been by me carefully examined and duly sworn to testify the truth the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness R. C. Milliken.

Direct examination by Mr. LOCKE:

Q. Please state your name age, and residence?

A. R. C. Milliken, age 43, at present residence Atlanta, Georgia.

Q. In what business or profession are you engaged?

A. I am organizing a life insurance company.

Q. What was your occupation in the years 1897 to 1900?

A. I was southern inspector for The Fidelity Mutual Life Insurance Company, the plaintiff in this case.

Q. Please state whether you remember the circumstances of one William A. Hunter disappearing from Pecos, Texas, on or about December 3rd, 1896, and of his sister Mrs. Jennie M. Mettler suing the Fidelity Mutual Life Insurance Company, then named the Fidelity Mutual Life Association to recover insurance upon his life

339 upon the theory that he had been drowned in the Pecos river?

A. I remember the circumstances very well.

Q. Please state in a general way what, if any connection you had with that litigation, and the matters out of which the same arose.

A. I received a telegram from the president, stating that a notice of the death of Hunter had been received and to go to Pecos city when I received the proofs, I went out there and began my investigation of the case.

Q. In a general way what did you do, not the details?—

A. I went up on the Pecos river where he was supposed to have been drowned and with parties in Pecos city thoroughly investigated everything connected with Hunter's departure from Pecos, securing his outfit &c. After I had made this investigation I presented the proof of loss to the beneficiary, then Mrs. Mettler now Mrs. Smythe, one of the defendants, and she asked me to write out—her answers. I wrote them and had the district and county clerk, J. B. Gibson to swear her to them; our regular printed forms were not sufficient for the extraordinary case like this and I propounded questions to her which she proceeded to answer and also swear to them before Mr. Gibson.

Q. About how long did you continue your investigations into the question as to whether or not Hunter had died and your efforts to obtain evidence?

A. Nearly two weeks; I think it was nearly two weeks I worked on the case right there in the town of Pecos.

Q. Please state whether the answers given you by Mrs. Mettler to the questions propounded to her were faithfully recorded by you?

A. They were.

Q. What was the substance of your report to the company as the result of your investigations at Pecos, as to whether Mr. Hunter had been drowned?

A. I reported that he had not been drowned and that it was a fraud upon the company.

340 Q. What, if any, connection had you with the matter after making such report? And during how long a time were you engaged in this matter?

A. From that time, in January 1897 until about July 1900, until the case was tried in the circuit court of the United States at Dallas.

Q. Please state in a general way what places you visited and what effort you made to obtain definite proof that Mr. Hunter was not dead during the time from January 1897 to July 1900; just a brief, general statement of it.

A. Many of the places I visited were on other business and I was making investigations—for instance I was here in Dallas frequently during these years and would make such investigations as I could; I think I made a trip or two to Fort Worth; I made several trips out to Pecos. I made a trip I think to Austin; I was down there I know, and made some investigations there in the land office.

Q. Please state whether you made any investigations, and if so, what, at Nashville, Tenn.

A. I was in Nashville on other business, and I made some investigation.

Q. What was the occasion of your making investigation at Nashville?

A. In some of the interrogatories to take my deposition I was asked if I knew a witness who stated that he had seen Hunter in Nashville during the early part of 1897. That witness' name I believe was—I can't recall the name——

Q. Was it Wallace?

A. That was the name, D. G. Wallace. They also in those interrogatories propounded a question to me in which they asked me if our company had anything to do with writing articles to some Newark, Ohio papers, and some months after these interrogatories were read by me I was in Tennessee and when I got there I made some investigation of Wallace, though I never saw the man in my life.

Q. Please state what, if anything your were able to learn of Hunter's presence at Nashville, Tenn. other than the information given by D. G. Wallace?

341 A. I saw Mr. J. A. Floresh, the proprietor of a tobacco store on one of the principal corners of Nashville in whose store Wallace and Hunter had the conversation.

Q. Please state whether you were able to in any way trace Hunter from Nashville, Tenn., or any information regarding his whereabouts beyond the statements made by Wallace?

A. Yes, I investigated, I went through all the hotels and registers I looked—went to the principal boarding houses and every where there was a register kept and looked to see if I could find his name—where he had registered his signature on any of these days. I took as a cue for the dates the newspaper of the date of the article that was written by Wallace to this Ohio newspaper, and I looked for several weeks prior to that time—the time of the article appearing in the paper.

Q. What was the result of that search.

A. I saw in none of these places where he had registered.

Q. Did you succeed in finding any trace of him beyond Mr. Wallace'- statement.

A. None at all—and Floresh's—none except Wallace'- and Floresh's.

Q. In the answer filed in this suit by the defendant Mrs. Smythe, I find the following passage:

"In response to such notice the adjuster of the plaintiff company, R. C. Milliken came to Pecos city, Texas and was given full information of the facts in reference to the drowning of said William A. Hunter, and of his life and family; that while in Pecos city said adjuster had sent him from the State office of said complainant company at Dallas, Texas, a telegram stating in substance that said company had William A. Hunter arrested and that the officer was then on the way to Pecos city with him; that upon receiving said

telegram at Pecos city said adjuster called at the home of the defendant Mrs. Smythe, who was then a widow, Jennie M. Mettler and showed her said telegram and threatened her and her brother with the penitentiary if she did not deliver up the said policies canceled at once, and promised her if she would do so, the said ad-
342 juster would see that neither of them were ever prosecuted. That she ordered him from her house, believing the telegram was false, as it was, and believing in the integrity and honor of her brother." Please state whether you are the R. C. Milliken to whom reference is made in said passage I have read to you?

A. I am.

Q. Please state whether you showed Mrs. Mettler a telegram received from the State office of the defendant company at Dallas?

A. I did not.

Q. Please state whether you showed her any telegram.

A. I did.

Q. I hand you a telegram on a Western Union Telegraph Co.'s blank dated 1/28, 1897 at El Paso, Texas, and reading as follows: "R. C. Milliken, Pecos, Texas: Have got your man; will reach Pecos on tonight's train with him; have sheriff meet us at train. J. J. Goode." On the back of this telegram is the signature "R. C. Milliken." Please examine this telegram and state whether or not this signature on the back of the telegram is your genuine signature and state whether this is the original telegram which you showed to Mrs. Mettler.

A. It is.

Q. Is the signature on the back your genuine signature?

A. It is.

Q. Please state the circumstances attending the exhibition of this telegram to Mrs. Mettler as fully as you can?

A. When I had been out there some two weeks making investigation, I was thoroughly convinced that Hunter was alive, and that a fraud had been perpetrated on the company. I had made investigation at the ticket office both at Pecos and other places where tickets had been sold, and I wanted to know whether she was a party to the fraud; I wanted to know also where he went to, which direction, which train, whether north, east or west he took. I had a friend, Mr. J. J. Good, whose name is signed to that telegram living in El Paso, a man who once resided in Dallas, Texas,
343 the son of the former district judge of this city. I prepared that telegram word for word, and wrote him to send it to me at 10 o'clock sharp, on January 28, 1897, and told him at that time I would be at Mrs. Mettler's boarding house, or where she was stopping—Mr. Heitman's. Before going up to Mr. Heitman's house I went to the Western Union office in Pecos and told them if any telegram came for me to send it up to Mr. Heitman's that I would be up there. I went up to see and talk to Mrs. Mettler, and while talking to her the messenger boy delivered me that telegram; I paid him for it and broke it open and read it and turned it over to Mrs.

Mettler, now Mrs. Smythe, who read it—took several minutes with her eyes fixed on the paper all the while, and finally she remarked "Thank God my brother is still alive." I told her to give me the policies and she told me that when her brother come she would turn them over to me. She didn't drive me out of the house; I walked out of the house without any word from her at all.

Q. What was her manner during the time you were with her after showing the telegram to her with regard to exhibition of alarm or surprise?

A. None at all.

Mr. CLARK: We object, because it calls for a conclusion of the witness.

WITNESS: I will state that she appeared just the same as she did before.

Q. Please state what if any conversation you had with her on that occasion with reference to the confinement of herself and her brother, or either of them in the penitentiary?

A. None.

Q. Please state how many telegrams you ever exhibited to Mrs. Mettler?

A. That is the only one.

Mr. LOCKE: I now hand this telegram concerning which Mr. Milliken has testified to the examiner to be marked "Exhibit A" and offer it in evidence.

344 Q. Please state whether you ever saw William A. Hunter who disappeared from Pecos on December 3rd, 1896 after the date of such disappearance and if you did, then state when and where and under what circumstances you saw him?

A. I saw him on the 27th day of April, 1902 sitting in a barber chair in a barber shop in Birmingham Alabama.

Q. What then occurred?

A. I waited at the door until he got his hair trimmed and as he came up to the door I walked up to him and offered him my hand to shake hands with him and said "How are you Will?" He had both hands full; he sat down one of his bundles or grips and shook hands with me.

Q. What did he say.

A. He didn't say a thing for a minute. He said he didn't know me. I remarked "Don't you know Johnson, who used to live at Childress, and then he said "Johnson, Johnson, Johnson," and threw his head down. I told him I was Johnson the former district attorney and lived at Childress and when I asked him again he said he didn't know me. I then remarked to him—I said "Don't you remember when I was district attorney and you were in the district clerk's office at Quanah," I said: You were in the district clerk's office at Quanah and he said "Yes." That is the only admission I could get out of him during my conversation with him as to his

whereabouts. I asked him where he had been and he said he had just been around every where; he didn't state anything definite. I asked him where he was living and he didn't answer that. I got no admission that his name was Hunter or Hunt or anything else. I didn't know him—I didn't know he was any where in the country until I saw him that time in the barber chair.

Q. How did you recognize him?

A. I recognized him from the photographs that I had seen which purported to be his.

Q. What was the result of your conversation with him at that time. What action did you take, if any?

A. He told me he had to go and catch his train, and I told him the first train he could get was to go to Texas and he asked me
345 what for, and I told him for swindling that insurance company. Then he asked me to go around—just go around where we could have a private talk, and I took him in the back of the barber shop, and he asked if we couldn't go up in a room and talk and I told him that was private enough; we had a conversation there in the barber shop with some eight or ten white barbers and in the meantime I had one of the barbers to telephone the sheriff's office to come down and apprehend an insurance swindler and I held him there until two deputies from the sheriff's office came down and then I swore out a warrant against him and was at the *habeas corpus* hearing.

Q. Please state whether you were present at the hearing of the application of the man whose arrest you caused for a writ of *habeas corpus* in the city court of Birmingham, Alabama?

A. Yes, sir:

Q. Under what name did he make that application, and what did he at that time claim was his name?

A. Hunt, William A. Hunt.

Q. Under what name had you been seeking for this man, or for evidence of his still being alive during the years from 1897 until 1900?

A. Hunter.

Q. When did you first learn that he had assumed the name of Hunt, or any other fictitious name?

A. One of the deputy sheriff's as — were going up to the jail told me.

Q. After the arrest?

A. Yes, sir.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I cannot recall anything.

Cross-examined by Mr. CLARK:

Q. Mr. Milliken, when did you first go out to Pecos?

A. In January, 1897.

346 Q. Who did you first go to see after arriving there with reference to this matter?

A. I stopped at the hotel and the first man I saw was the proprietor of the hotel and asked him all about it?

Q. Do you remember his name?

A. I can't recall it; I know his name, he had a son named Claude, he run the hotel right there on the corner; his son was named Claude, a boy about seventeen or eighteen years old.

Q. Who did you next see with reference to this insurance? Who did you see before you went to see Mrs. Mettler?

A. I think I saw J. B. Gibson, this hotel man and R. S. Johnson.

Q. How long after arriving at Pecos before you saw Mrs. Mettler?

A. I saw her that day.

Q. When you saw her, what attorney, if any, did she refer you to?

A. She didn't refer me to any attorney.

Q. When did you first see Mr. Gage?

A. I saw him while there.

Q. Didn't you see him that day?

A. I may have done it. I can't recall now.

Q. What did you tell Mrs. Mettler when you met her and where did you meet her?

A. I met her first at Heitman's with whom she was living.

Q. What did you tell her you were?

A. I told her I represented the insurance company and had the blank proofs of loss.

Q. Is it not true that after talking with her you took the matter as to proof of death with Mr. Gage an attorney there?

A. No, sir.

Q. Is it not true that she and Mr. Gage told you that he had written the notices that had been sent to the company?

A. No, sir.

Q. Is it not true that she referred you to Mr. Gage as her attorney to make out proof of death?

A. No sir, Mr. Gage told me that he was not her attorney.

347 Q. Is it not true that you and Mr. Gage in a conversation concluded that on account of the character of the necessary proof of death that the printed form would not answer and that you being familiar—practically familiar with the matter of proofs of death that you could go ahead and make up proof of death?

A. No sir. Now since you have brought this to my mind I will state this: I propounded these interrogatories in the supplement proofs and submitted them to her and she remarked—she asked me if it was necessary &c., and said she would like for me to consult Mr. Gage I did go to see him and submitted him these supplemental proofs.

Q. It is true that the ordinary printed proof of death would not answer in a case like this?

A. No, you couldn't get out the facts.

Q. Is it not true that you saw Mr. J. B. Gibson and got him to drive around with you and introduce you to different parties whose names had been given you as knowing something about the matter?

A. Several of them did.

Q. Didn't you employ Mr. Estes to go around with you and take affidavits?

A. I don't think he ever did go with me to take affidavits.

Q. Did Mr. Gibson go with you to take affidavits?

A. I can't recall that he ever did I think that all the affidavits were taken by Mr. Gibson; I would give him the papers and let him go to the parties; I can't recall a single instance in which I was present when the affidavit was made.

Q. Is it not true that while you were there on this visit you took a number of written instruments and had them sworn to. Some twenty or thirty?

A. No, sir.

Q. How many different papers from different parties——

A. I took one from J. B. Gibson; I took several of the supplemental proofs; in several instances these proofs were interlined by Mr. Gibson in Mr. Gibson's handwriting. I took one from R. S. Johnson; these were the only ones I can recall of the proofs of loss that Mr. Gibson took; I don't know that he took all these. I think the county judge or some other person there—the district attorney was a notary public and took some.

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Q. Didn't you take any written statements except from Gibson and R. S. Johnson?

A. I took one from one or two parties.

Q. Who.

A. I took one from the hotel man where Hunter was stopping; I took one I believe from a livery man; I think those are all I recall; yes, possibly—no, these were the only ones I can recall.

Q. Didn't take the statement of a cow boy named Slack?

A. No, sir.

Q. Did Mr. Gibson drive over with you to Barstow in a buggy and introduce you to parties there?

A. Mr. Johnson, Mr. Gibson and some other person- whose names I cannot now recall and I went up to the scene on the Pecos river where Hunter's wagon and outfit was found and we came back by Barstow.

Q. Mr. Gibson introduced you to Capt.—I forget his name, the former sheriff there? (Irvine)

A. Yes, sir.

Q. Met some of his family.

A. Yes, sir.

Q. Mr. Gibson introduced you to him?

A. Yes, Capt. Irvine was his name.

Q. Gibson introduced you to R. S. Johnson.
A. No.
Q. How many times did you go up on the river during the two weeks you were out there?
A. One time.
Q. Are the proofs of death you got up there here in town?
A. I don't know.
Q. You haven't seen them since you have been here?
A. No, sir.
349 Q. How long have you been in the city on this visit?
A. I have been in and out. I came here possibly three weeks ago. I have been out of the city at one time for a week. This is the first time I have been to Dallas since the case was tried.
Q. Does not the papers you got up at Pecos constitute the proof of death—having reference to it make a considerable pile of papers?
A. No sir.
Q. Just a few papers? Is it not true that you propounded some typewritten questions to Mrs. Mettler that she answered Mr. Gibson swore her to them and went back and got a second statement from her and then the third time from her, at different times?
A. I think so.
Q. She willingly gave you these statements?
A. No, not willingly.
Q. She gave them to you?
A. When I had seen Mr. Gage—she said she would see Mr. Gage, and she saw him and interlined them.
Q. He told her to answer them.
A. Yes, with the interlineation.
Q. The interlineations, so far as you know were true?
A. I don't know anything about —.
Q. You talked with every body out there—investigated fully?
A. Yes, sir.
Q. From what you learned out there were not the interlineations correct?
A. No.
Q. Were you not here at the trial of the case?
A. Yes.
Q. Did you testify in the case?
A. I did not.
Q. If she made false proof of death why didn't you show it on the trial?
A. Because shysters like you prejudiced the jury.
350 *A.* I don't want any personalities. I didn't ask you that, I don't care for your opinion of me?
A. That is just the reason.
Q. Just answer the question?
A. You asked me why I did not testify, and I said——
Q. You stated your opinion in this case and I am not asking you

about it, is it not true that the reason you didn't testify was that you—you have been a lawyer?

A. Yes.

Q. You practiced law at Weatherford?

A. No sir.

Q. In Texas?

A. I was county attorney of Hood county, was raised there.

Q. Is it not true that the Fidelity Mutual Insurance answered—didn't it answer—didn't set up that the proof of death was not sufficient?

PLAINTIFF: Objected because it is immaterial.

WITNESS: Get the papers and see what the answer is.

Mr. CLARK: State whether you remember or not?

A. It has been so long; if you have got them and will let me see the papers I can tell you.

Q. State from your best recollection?

A. They answered—the insurance company answered that proofs of death were insufficient; I know that in one of their answers.

Q. I asked you whether they pleaded that in their answer?

A. I can't tell Mr. Clark.

Q. If you don't remember say so?

A. Certainly I dod not, I have told you so.

Q. Don't you remember Mr. Milliken that in reply to the answer that proofs of death were insufficient Mrs. Mettler pleaded that proofs of death were waived by reason of your denying liability and presenting her this telegram. Don't you remember that Mrs. Mettler in her case pleaded that the proof of death had been waived by the insurance company denying liability, and by the fact of you, its representative, presenting her with that forged telegram or
351 false telegram? Don't you remember that being plead.

Mr. LOCKE: Plaintiff objects to all the examination on the condition of the pleadings in the suit of Mettler against the insurance company, on the ground that it is irrelevant and immaterial, and the pleadings themselves are the best evidence.

CLARK: Just state whether you remember that pleading.

A. I don't remember any of the pleadings.

Q. Is it not true that you wrote the pleadings in that case, consulted with Perkins & Gilbert from time — in the conduct of that case?

A. I can't recall that I ever read them a single time.

Q. Is it not true that you personally attended to the taking of depositions in that case.

A. In most instances I gave the interrogatories and commissions to officers taking deposition-, in presparation of int'ys, I consulted with the Co.'s att'ys.

Q. Is it not true that you propounded interrogatories to J. B. Gibson and others at Pecos?

A. If I didn't I was present and assisted, in the testimony of many of the witnesses.

Q. Didn't you come to the office of Alexander, Clark & Hall and ask me if I would cross them, and I told you I couldn't and you said other engagements made it very important that you go to Pecos the next morning and ask if I would not cross asked me if I would not come back——

A. I can't recollect.

Q. Don't you recollect coming to my office after supper to get the crosses——

A. I can't recollect it. I can't say, I don't recollect it.

Q. You don't recollect asking me to cross them after supper?

A. I asked you one time——

A. These first interrogatories, when you first went out to take the depositions?

A. I remember.

Q. Don't you remember that well?

A. I can't recollect at all——

352 Q. Asked me to waive commission so you could get off the next morning.

A. It may be true, I don't remember anything about it.

Q. Don't recollect me giving you an agreement so you could get off the next morning?

A. I do not.

Q. You got the crosses and interrogatories and went out there and took evidence?

A. I went to see it was taken—all properly answered.

Q. Employed Mr. Estes to take it.

A. No, sir.

Q. Who took it?

A. I think the county judge.

Q. Was it not the county attorney.

A. He took Mr. Gibson's deposition.

Q. His name is Estes?

A. Yes, sir; Heffner took most of them.

Q. Who took Mr. Gibson's?

A. Estes took that.

Q. When Mr. Estes took Gibson's deposition were you present?

A. No, sir.

Q. Did you carry them out there?

A. Yes sir.

Q. When he went to take Gibson's depesition weren't you present and showed him some pictures?

A. Before he took them?

Q. When Mr. Estes was writing the answers?

A. No sir.

Q. Didn't you and Mr. Gibson have some words, and didn't Mr. Gibsdon refuse to give any answers until you left.

A. No.

Q. Didn't you leave and go and propound additional interrogatories to Mr. Gibson after sending back here to be filed and
353 give to the notary Mr. Estes, and Mr. Estes—you asked him to answer these additional interrogatories and didn't he write "Refused to answer because you had no right to propound additional interrogatories"?

A. I believe that is the truth.

Q. As a lawyer didn't you know you didn't have?

A. I though- I had. I think I got advice of attorneys here?

Q. When that deposition of Gibson's was taken by Estes did you have him turn that deposition over to you as agent of the company?

A. Yes.

Q. Didn't you write or wrire Perkins & Gilbert that you were not going to return the deposition into court? The idea being that it was not satisfactory.

Plaintiff objected.

A. I can't recollect any such letter.

Q. Didn't you refuse to return the deposition into court after receiving it as agent of the company, and walk up to the office of Perkins & Gilbert and tell them you were not going to return them?

A. I don't recollect it.

Q. After you received the deposition what did you do with it.

A. Returned it into court.

Q. That is your recollection?

A. Yes sir.

Q. You don't remember carrying it to Perkins & Gilbert's office?

A. I may have carried them to their office; I don't say I didn't.

Q. Which is correct? I understood you to say remember having carried them into court? Did you return them into court or return them to the law office of Perkins & Gilbert?

A. Returned them into court and had them in the law office too; had them in my grip.

Q. You don't recollect communicating with them from Pecos saying that you would not return the deposition?

A. No sir.

Q. You don't remember telling them—refusing to turn them—after reaching Dallas, refusing to turn them into court, that
354 they could do as they pleased?

A. No sir.

Plaintiff objected.

Q. You were present when this case was tried, were you on the witness stand?

A. I told you I was not?

Q. Why didn't you testify?

A. As I said, because you, as a shyster had prejudiced me with the jury and in every way——

Q. Don't you know I am treating you respectful and you are

attempting to—you are trying to pick a row; I didn't ask you that, I asked you why——

A. You asked me why I didn't testify and I stated——

Q. You state under oath that the reason you didn't testify in that case was because I was a shyster?

A. Yes, and had prejudiced me before the jury.

Q. How many of that jury did I know to your knowledge?

A. I don't know.

Q. Is it not true that you don't know whether I personally knew any one or not.

A. I don't know who you knew, and care less.

Q. How did I prejudice you before the jury so you couldn't get a fair hearing?

Plaintiff objected.

A. Whenever there was a material question propounded by us you would get around and snicker like it didn't amount to anything, and attract the attention of the jury from the important testimony that was being read by the defendant, the insurance company. That is the way of a shyster, and a man who wants to try a case on its merits don't lug any such things as that into it; he tries it on his merits.

Mr. LOCKE: We object to all this testimony.

Mr. CLARK: Is it not true you were sitting beside your lawyers?

A. Yes, part of the time.

355 Q. Most of the time?

A. I was a great deal of the time.

Q. Is it not a fact that you whispered to them, spoke to them and made suggestions to them in the matter of the examination of witnesses?

A. I didn't make many suggestions?

Q. You could have done so.

A. Yes.

Q. You are a licensed lawyer? Did Judge Meek refuse to make me behave myself? Did you or any of the parties object to my manner of trying the case?

A. In several instances they did.

Q. Did the court refuse to make me try it——

A. He did several times on defendant's objection he made you stop.

Q. Will you say that the case was tried in such a manner as to prejudice the case so you would take the stand?

A. That is the reason I refused to speak to you, you acted the shyster before the jury, and you couldn't speak to me on the street.

Q. When did I ever offer to speak to you?

A. Right down here the other day, coming up the street, between here and the county court house.

Plaintiff objected.

Q. I did pass you and call you Milliken; I said "How do you do Mr. Milliken," and you went on, I didn't know whether you did it intentionally or not; I didn't know whether you saw me or not?

A. There is another thing between us, it is just your lying conduct.——

Q. Now Mr. Milliken, you know you have no right to talk—I appeal to the examiner—I asked you civil questions and I am entitled to have them answer- respectfully.

Q. Is it not true that in the case in Wood county you had a row with the attorneys——

A. I was leading counsel in that case.

Q. Didn't you have a row with the attorneys?

356 A. I was not attorney in this case.

Q. You were sitting by advising?

A. I was there to answer some questions as they — propounded to me.

Q. Was not your name*d* signed to some of the pleadings in the Mettler case?

A. I don't think it was. If it was I had nothing to do with it.

Q. You have not answered my question with reference to the Wood County case?

A. What has it to do with this?

Q. If you refuse——

A. I *I* have had a good deal to do with s*y*yster lawyers and——

Q. I didn't ask you about shyster lawyers, I asked you to answer my question with reference to the Wood County case in which Judge Morris was attorney; didn't you have some controversy? Personal controversy?

A. No sir.

Q. Personal difficulty?

A. No sir, I di*d*charge*d* one of the lawyers and got some others.

A. I mean opposing lawyers, I am not speaking of your own lawyers. While you were at Pecos didn't you drive up the river with Mr. Gibson and Mr. Slack and give Slack five dollars to go in the river, and is it not true before he would go in the river he tied a rope around his waist and you and Mr. Gibson stood on the bank and held the rope while he w*n*et in to show how deep it was?

A. Yes, he went in, the water was very cold and——

Q. Did that occur?

A. Yes sir.

Q. You gave him five dollars?

A. Yes.

Q. Tied a rope around his waist?

A. Yes.

Q. You and Gibson stood on the bank and held it?

A. Yes.

357 Q. At the time you were at Pecos, did you board at the hotel there you speak of?

A. Yes.

Q. How long, all the time you were there?
A. I got a room over Mr. Johnson's saloon after I was there——
Q. How many days had you been there before you got a room over Johnson's saloon?
A. I didn't get it on the first trip at all. I don't believe I got a room from Mr. Johnson the first time I was there at all.
Q. Only one hotel in town?
A. Two.
Q. What size town is Pecos?
A. Pecos has fifteen hundred people I guess.
Q. Two hotels there?
A. Yes sir.
Q. How many trips did you make out there
A. Three or four.
Q. Is it not true that each time after the first you stopped in a room over Johnson's saloon and eat at a restaurant?
A. Yes.
Q. You go to these rooms—go t-rough the bar and there is a stairway from the bar room to the rooms above?
A. No sir, on the outside.
Q. You are certain the stairs are on the outside?
A. Yes sir from the outside and inside too.
Q. Is it not true that each time you were there you would go to the stable and hire hacks and drive up the river where the camp was found and take the same parties nearly every time?
A. Yes.
Q. Did you pay them for their time on these trips?
A. Yes.
Q. How many times did you carry Henry Slack, the cow boy up there?
358 A. Possibly three times. About three times I think.
Q. You paid him for each trip.
A. Yes.
Q. How much did you pay them for each trip?
A. I think it was two dollars a day.

It is understood that the plaintiff objects to all this cross examination, on the ground that it is irrelevant, immaterial, and unnecessarily encumbers the record.

Q. Is it not true that you took koda- pictures up and down the river siveral times?
A. At this scene where the supposed drowning occurred I did, and at the dam.
Q. Took them yourself.
A. Yes, sir.
Q. These pictures were in evidence on the trial of the case?
A. Yes, some of them.
Q. With reference to the proof of death you got up there, were they introduced in evidence on the trial of the case?

A. I cannot tell you.

Q. Don't you remember your attorneys had these proofs of death and used them on the examination of Mrs. Mettler and other witnesses?

A. I think they did.

Q. Is it not true they were not introduced in evidence?

A. I think so, but I cannot recall; I think some parts of them were introduced if my memory serves me correctly.

Q. Where did you first meet Judge Littler?

A. I met him in Big Springs.

Q. How far is that from Pecos?

A. Possibly 125 miles about that.

Q. East of Pecos?

A. Yes.

Q. How came you to meet him, did you ever know him before? Under what circumstances?

359 A. I had heard when I was in Pecos in December 1897, that Judge Littler had seen Hunter in Arkansas. Judge Littler had been to Pecos and had told some of them—Mr. Gage, I know I talked to him about it; on my way back to Dallas from that trip in December 1897—the trip from Pecos I stopped at Big Springs and saw him.

Q. How came you to talk to Mr. Gage?

A. I talked to him, I cannot recall.

Q. How come you to talk to him?

A. He told me that Judge Littler had been over there and stated that he had seen Hunter.

Q. Mr. Milliken, was it not Mr. Estes, the county attorney?

A. Mr. Estes told me, and Mr. Gage also.

Q. Was he not present here at the trial of the case and testified for the insurance company that Judge Littler told him and that he told you?

A. Mr. Estes didn't testify.

Q. He was here?

A. Yes.

Q. Didn't you go out to Pecos and come in with the witnesses?

A. I think I did?

Q. Went out there and came back on the train.

A. Yes.

Q. Mr. Estes came with you?

A. Yes.

Q. Didn't he testify?

A. No sir, I don't think he did, I don't know, possibly he did.

Q. Is it not true Mr. Estes was the first person that told you any thing about Judge Littler?

A. Whether Mr. Estes or Mr. Gage told me first I would not say.

Q. You say Mr. Gage told you Judge Littler said he saw Hunter?

A. Yes.

Q. Is it not true that Judge Littler had never seen Hunter in his life, and never knew him?

360 A. I don't know.

Q. Is it not true that you went to Littler's home in Big Springs and showed him the pictures of Hunter you had, and he then told you that was the man he saw on the sleeper going through Arkansas?

A. No sir.

Q. Didn't you go and show him the picture?

A. I showed him a number of pictures.

Q. Didn't you show him these pictures to get him to identify him?

A. I asked him to pick out the man he saw and he did it.

Q. Is it not true Judge Littler had never seen and had no acquaintance whatever with Mr. Hunter up to the time he went in that smoker of the sleeper?

A. I think that is true, so far as I know. I understand he never had seen him until he saw him in the smoker.

Q. Is it not true he had no conversation with him in the smoker?

A. I don't know. He said he had some conversation.

Q. To refresh your memory, is it not true that Judge Littler told you in his conversation—he went in the smoker and got in conversation with another gentleman and Hunter left the smoker and went in one of the passenger coaches, and this other gentleman said that the man who just left them was a Texas, or a sheriff of some county in West Texas?

Mr. LOCKE: To all this testimony with regard to the conversation between the witness and Judge Littler plaintiff objects upon the ground that it is irrelevant, immaterial and hearsay.

It is considered that all this testimony is objected to by the plaintiff.

Q. Don't you know his evidence has been taken in this case?

A. No, sir, I don't know anything about it.

Q. Don't you know that Judge Littler's evidence has been taken?

A. No, I never heard of it, in fact I don't know anything about this case.

Q. Is it not true that Mr. Wallace of Nashville wrote a

361 New York paper that he saw Mr. Hunter on the street car—do you know whether he did or not?

A. I never heard of it if he did.

Q. It is true that he said he saw him in a drug store?

A. Not in any New York paper.

Q. In some Newark paper?

A. I don't know, the paper states for itself. I have not had this on my mind for several years. It is inadmissible any way.

Q. When you showed Mrs. Mettler that false telegram you say nothing occurred: did she either then, or before you left, didn't she get on one side of the stove and you on the other and have some words about giving up the policy?

A. I asked her to give up the policies, and she said wait until her brother came.

Q. No excitement at all?

A. When I got up she got up and went over—I think she went out through one room, and I went out the front door, I know.

Q. Didn't she understand Mr. Milliken for several days you were there making up proofs of death for her—in her behalf?

A. I don't know what she understood.

Q. Did you have to get this proof of death—did you go to her and tell her goodbye and tell her you would send all proofs of death to the company?

A. No, sir.

Q. Did you do that the day before this telegram —?

A. No sir.

Q. You never told her good bye.

A. No sir.

Q. Did you ever tell her that you couldn't treat a woman that way, that you knew her brother was not dead and knew there was a fraud and that you couldn't treat a widow that way—told her you knew her brother was not drowned, were you not talking som-thing that way when this telegram came?

362 A. No sir.

Q. You knew the telegram was going to be sent?

A. Yes sir.

Q. What had you been talking about before that?

A. I don't know, I can't recollect I hadn't been in but a few minutes.

Q. Didn't you tell her you knew her brother was not drowned?

A. No.

Q. Was not that the first time you ever told her that?

A. I think I went there on that occasion to tell her what I thought about it.

Q. That was the first occasion.

A. Yes sir, I said nothing to her, I told her all I wanted was the truth; on every occasion she would say, "I just don't know how to answer that, or what effect it would have," I said "Tell the truth, that is all we want, just tell the trith, I would record these things just exactly as she stated.

Q. These proofs of death were recorded that way?

A. Just as far as they went, I wrote down every statement just exactly as she told it.

Q. Are you connected with the Fidelity now?

A. No, sir.

Q. What company are you with.

A. I am organizing a Southern life insurance company.

Q. Is it incorporated yet?

A. No sir.

Q. You were working to incorporate?

A. I hope to.

Q. You have had a great deal of feeling in that case?
A. I have had some.
Q. Hav-n't you had a great deal—hav-n't you been very bitter?
A. I take an interest in everything I go into.
363 Q. Didn't you have a personal difficulty with Judge Spoonts down at the Windsor hotel while the case was being tried?
A. I did.
Q. Didn't you have all along in the case a great deal of feeling?
A. I hit him.
Q. That is not answering my question; hav-n't you had a great deal of feeling in the case?
A. I never let my feelings interfere——
Q. Answer my question, hav-n't you had a great deal of feeling?
A. It is owing to what you mean.
Q. I mean hav-n't you been very bitter in this case? You understand what bitter means.
A. No sir.

Redirect examination by Mr. LOCKE:

—. I show you a printed and written paper headed "Proof of death and justness of claim," submitted to the Fidelity Mutual Life Association of Philadelphia, purporting to be signed by Jennie M. Mettler, under date of January 18, 1897 and sworn to by her before J. B. Gibson, clerk of the court of Reeves county, Texas. Please state whether this is one of the papers which—upon which you wrote down the answers to Mrs. Mettler as you have testified?
A. That is.
Q. I show you a paper in typewriting and manuscript headed "Supplemental proof of loss" submitted to the Fidelity Mutual Life Association under policies numbers 73372, 73373 and 73374, and purporting to be signed by Jennie M. Mettler and sworn to by her before J. B. Gibson, under date of January 22, 1897. Please state whether this is one of the supplemental affidavits concerning which you have testified that you wrote down faithfully the statements made by Mrs. Mettler?
A. That is correct, that is made by her as supplemental proof.
Q. I show you a paper in typewriting and manuscript headed "Supplemental affidavit No. 2, submitted to the Fidelity Mutual Life Association under policies numbers D–73372, 73373 and
364 73374, on the back of which is a personal memorandum reading as follows:
"Beneficiary made answers herein contained and county clerk went to her to swear her and made such corrections and additions as are therein contained. She refused to swear to same until she consulted her attorney. R. C. M." Please examine said paper and state how it was made, and by whom the statements therein contained were made?

A. The typewritten questions were propounded by me and most of the writing was done by me. There are several interlineations in the written portion of this statement that was made by Mr. Gibson, the balance of the writing was done by me in the presence of Mrs. Mettler and in response to her statements.

Q. Please state whether the matter written in your hand writing in this statement is or not, a faithful transcription of the statements made to you by Mrs. Mettler?

A. It was.

Recross-examination by Mr. CLARKE:

Q. These papers were in court during the trial of the Mettler case?

A. I think they were.

Q. You spoke of your deposition having been taken in the Mettler case, is it not true that a commission to take your deposition was placed in the hands of Rhodes Baker, of the firm of Etheridge & Baker and he notified you to come before him and give your deposition and that you did go there late one eve-ing and answered a few of the questions?

A. Yes.

Q. Is it not true that you told him you would be back the next morning and finish?

A. I don't recall that.

A. Is it not true that you left town and never did finish your deposition?

A. I know I didn't finish them.

Q. When you appeared before didn't you tell him—after answering three or four questions, didn't you tell him you couldn't finish them?

A. I did not.

365 Q. And say you would be back the next morning?

A. I can't say what I told him, I know I never did answer them and never did go back.

Q. Why?

A. I had business out of town.

Q. After the trial of the Mettler case didn't you come to my office and speak to me and ask me for some of the papers in the case, saying the attorneys, your attorneys wanted them, and you come in and got the papers?

A. I don't know, you said you couldn't give them up I asked you——

Q. You come to my office?

A. I did and didn't get them.

Q. Didn't you come for the charge of the court?

A. I went there after the papers in the case and you said you were using them and I didn't get them.

Q. Didn't you come on one occasion after the trial and get the charge of the court, asked me if I hade the charge?

A. I tell you I went to get the papers and didn't get them and never have seen the papers since that day.

R. C. MILLIKEN.

(The following words and figures appear on the telegram.)

Form No. 290.

The Western Union Telegraph Company.

Incorporated.

21,000 Offices in America. Cable Service to All the World.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within ninety days after the message is filed with the company for transmission.

This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

THOS. E. ECKERT,
President and General Manager.

Number	Sent by	Rec'd by	Check
1 s	C	ue	19 collect.

1/28, 1897.

Received at 1001 A.
Dated El Paso, Texas, 28.

To R. C. Milliken, Pecos, Texas:

Have caught your man will reach Pecos on tonight's train with him have sheriff meet us at train.

J. J. GOOD.

Endorsed on back of telegram: R. C. Milliken.

I do further certify that the testimony so given by the said witness R. C. Milliken was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by said witness in my presence and in that of such of the parties and counsel as were in attendance, the genuine signature of the said witness appearing above.

I do certify that the telegram attached hereto as Exhibit "A" is the

identical original telegram concerning *with* the witness R. C.
366 Milliken testified, and which he identified in his testimony.

I do further certify that I have retained in my possession until this moment the foregoing depositions of the witnesses Nettie Meyer and R. C. Milliken and that I am now sealing and addressing the same for transmission by mail, to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony of all of which I have hereunto *set* my hand, at Fort Worth, Texas, this the 13th day of October, A. D. 1904.

G. W. PARKER,
Special Examiner.

Witness Fees Paid by Plaintiff.

Nettie Meyer	1.50
R. C. Milliken	1.50
My fee for taking this deposition is	$21.75

G. W. PARKER,
Special Examiner.

Filed Dec. 24, 1904.
J. H. FINKS, Clerk.

367 Copy.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, *v.* JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	In Equity.	No. 597.

The plaintiff propounds to WILL F. DAVIS, who resides in Nashville, Davidson county, Tennessee, the following—

Direct Interrogatories.

1. Please state your name, age and place of residence.

—. In what occupation or profession are you engaged, and how long have you been so engaged?

3. Please examine the original files in cause No. 1,766, entitled W. A. Hunt *v.* J. I. and W. A. Newsom, and cause No. 21,422, entitled W. A. Hunt *v.* Grand View Nursery Co., in the office of the clerk of the circuit court for Davidson county, Tennessee, and state what, if any, professional relation you sustained to either or both of said litigations.

4. Please state who was the plaintiff in each of said litigations, and whether the same person was plaintiff in both of them.

5. Please state whether the Grand View Nursery Co. was a corporation, or a copartnership; and state who were the active partners, or stockholders and managers, in said company.

6. There is on file among the papers in cause No. 21,422 what purports to be a contract between the plaintiff and the defendant in that suit. Please examine the same and state with reference
368 to it; first, whether you are familiar with any of the signatures appended to it, and, if so, with which of them, and whether each signature with which you are familiar is in your opinion the genuine signature of the party whose name it is, and, second, whether said contract now on file among the papers of said cause No. 21,422 was recognized and treated during the progress of the said litigation by all of the parties thereto as being the original contract out of which arose the controversies litigated.

7. The officer taking your deposition will hand you a certified copy of a contract on file among the papers of said cause No. 21,422. Please examine it, attach it to your deposition appropriately marked for identification, and state whether it is a true copy of the original contract concerning which you have testified in answer to the preceding interrogatories.

8. Please state, if you know, where the plaintiff in cause No. 21,422 was residing at the time said action was brought.

9. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or any of them, or that may be material to the subject of this your examination or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Endorsed: Filed Oct. 3, 1904. J. H. Finks, clerk.

In the United States Circuit Court for the Northern District of Texas, at Dallas.

I do hereby certify that the foregoing is a full, true and correct transcript of *of* direct interrogatories propounded by the plaintiff to Will F. Davis, witness for the complainants in case No. 597,
369 and styled: The Fidelity Mutual Life Insurance Co. *vs.* Jennie M. Smythe, *et al.*, as appears from the records of said court now in this office.

Witness the seal of said circuit court at Dallas, Texas, and the name of the clerk thereof, this 15 day of Octo., 1904.

[SEAL.]

J. H. FINKS,
Clerk of said Court,
By —— ——,
Deputy Clerk.

Indorsed as follows: No. 597. In the U. S. circuit court, northern district of Texas, at Dallas. The Fidelity Life Ins. Co. *vs.* Jennie M. Smythe, *et al.* Copy of notice and interrogatories to Will F. Davis, witness for plaintiff. J. H. Finks, clerk, by —— ——, deputy.

Stokes & Stokes, Lawyers, Nashville, Tenn.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *vs.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Co., Def'ts.	In Equity. No. 597.

370 Answers and depositions of Will F. Davis to the direct interrogatories propounded to him in the above styled cause, taken before Jordan Stokes, Jr., a notary public in and for Davidson county, Tennessee, in accordance with the commission hereto attached.

Answers to Direct Interrogatories as Numbered.

Ans. 1. W. F. Davis; my age is 36 years. I reside in Nashville, Tenn.

Ans. 2. I am a lawyer, having been practising since 1895.

Ans. 3. I have examined the records in said cause. I was attorney for defendants in both cases.

Ans. 4. W. A. Hunt was plaintiff in both cases. The plaintiff in both cases is the same person.

Ans. 5. J. I. Newsom and A. W. Newsom were the partners composing the firm "Grand View Nurseries." The Grand View Nurseries was a partnership. The Cumberland Nurseries is a different name for the same partnership, & composed of the same partners, viz: J. I. & A. W. Newsom.

Ans. 6. I have examined the contract referred to. I am familiar with the signatures of both parties to the contract. The signatures are the genuine signatures of the parties whose names they represent. Said contract was recognized & treated in said suit by all the parties as the original contract upon which the suit was based.

Ans. 7. I have examined the paper marked Exhibit No. 1 to my deposition and compared it with the original contract between Cumberland Nurseries by A. W. Newsom and W. A. Hunt, & the same is a correct & true copy of said original contract, after changing the word "from" to "for" on the first page, and the word "marked" to "worked" on the second page.

Original Contract.

NASHVILLE, TENN., Jan'y 1st, 1897.

371 Contract and agreement between Cumberland Nursery and Henry Newson of the first part, of Nashville, Tennessee, and W. A. Hunt of the same place.—W. A. Hunt agrees to travel and solicit orders for nursery products for the parties of the first part and to devote his whole time and attention thereto for such a time as it shall be deemed advantageous to the parties of the first part. That he will work faithfully and diligently to and for the interest of the parties of the first part; that he will carry out and comply with all the instructions of Cumberland Nurseries, and Henry Newson; that he will use only fair and honorable means to obtain orders. That he will sell at prices given him and not deviate therefrom. That he will ascertain to the best of his ability the standing and responsibility of all his customers. That he will not take any conditional orders; that he will have each of his customers sign his or her order given; that he will not include in his weekly reports any sales or to send in any orders from any whom he does not believe to be good and responsible. That he will endeavor to keep his expenses as low as possible and that he will stay in the country from Monday morning until Saturday night. It is also agreed that the reports furnished by Cumberland Nurseries and signed each week by W. A. Hunt shall be a part of this agreement and a basis of settlement between the parties hereto.

W. A. Hunt agrees to report each week all sales, time and expenses upon the blanks furnished. In consideration of the faithful performance of the foregoing agreement by W. A. Hunt, parties of the first part hereby agrees to employ W. A. Hunt upon the terms and conditions aforesaid and to pay all his necessary traveling expenses and to pay him for such services rendered at the rate of forty ($40.00) dollars per month, time actually worked (26 days to constitute a month) for such time as he may act as salesman and in compliance with the terms and conditions of this agreement with the instructions of Henry Newson.

It is mutually agreed between the parties hereto that W. A.
372 Hunt shall not draw more than 50 per cent. of his salary until after the stock he has sold shall have been delivered or deliveries made. W. A. Hunt's time shall commence when he takes his first order and shall end when he takes his last order, but the parties of the first part agrees to pay W. A. Hunt's — to and from Nashville; all settlements shall be made at the office of Cumberland Nurseries.

CUMBERLAND NURSERIES,
By A. W. NEWSON.
W. A. HUNT.

W. A. Hunt, 1897. Salary contract $40.00 with Henry Newson.
Exhibit "A" to recoupment.
Exhibit No. 1 to my deposition.

W. F. DAVIS.

Ans. 8. W. A. Hunt was residing at Birmingham, Ala., at the time said action was commenced.

Ans. 9. I have no personal knowledge of any other facts which I believe would be relative to the issue in this cause.

W. F. DAVIS.

THE STATE OF TENNESSEE, }
County of Davidson. }

I, Jordan Stokes, Jr., a notary public in and for Davidson county, Tennessee, do hereby certify that the foregoing answers of Will F. Davis, the witness before named, were by him made before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and the seal of my office at Nashville, in Davidson county, Tennessee, this, the 29th day of October, A. D. 1904.

[SEAL.]

JORDAN STOKES, JR.,
Notary Public, Davidson County, Tennessee.

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Witness fee.....	$1.50	P'd by M. E. Locke.
Notary's fee.....	2.00	" " " " "
Circuit clerk fee.....	3.50	" " " " "
Total.....	$7.00	This is for transcripts.

Indorsed as follows: 597; filed Dec. 24, 1904. J. H. Finks, clerk.

374 United States Circuit Court, Fifth Circuit and Northern District of Texas, at Dallas.

The President of the United States of America to any clerk of a court of record having a seal, any notary public, or any commissioner of deeds, duly appointed under the laws of the State of Texas, within the State of Tennessee, Greeting:

Know ye, that we in confidence of your prudence and fidelity, have appointed you, or either of you, and by these presents do give unto you full power and authority, diligently to examine Will F. Davis, upon certain interrogatories propounded to him in a cause numbered 597, wherein The Fidelity Mutual Life Insurance Company, plaintiff and Jennie M. Smythe *et al.*, defendants, which said cause is now pending in the circuit court of the United States for the fifth circuit and northern district of Texas, in the fifth circuit, and therefore we command you, at certain days and places to be appointed by you for that purpose, cause the said witness to come before you, and then and there examine him upon the said interrogatories (copies whereof are hereto annexed) on his corporal oath first taken before you upon the Holy Evangelists, or in such other solemn manner as is and may be authorized by law; and that you do take the answers of the witness to such interrogatories and re-

duce the same to writing, which shall be signed and sworn to by the said witness; and you shall certify under your hand and seal that the same was signed and sworn to by the said witness before you, and shall seal them up in an envelope, with the interrogatories and this commission, with your name written across the seal, and indorse on the envelope the name of the parties to the suit, and the name of the witness, and direct the package to the "clerk of the circuit court of the United States for the northern district of Texas, Dallas, Texas." If sent by mail, the postmaster, or his dep-
375 uty, mailing the same shall indorse thereon that he received them from the hands of the officer before whom the answers to said interrogatories were taken.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Dallas, in said district, this 5th day of Octo. in the year of our Lord 1904, and of the American Independence the 128 year.

J. H. FINKS,
Clerk of said Circuit Court,
By —— ——,
Deputy Clerk.

NOTE.—The officer who executes this writ is respectfully requested to endorse on the reverse side an itemized statement of his own and any witness or other fees incurred, crediting any payment made thereon.

J. H. FINKS, Clerk.

Indorsed as follows: No. 597 Eq. U. S. circuit court, northern district of Texas, at Dallas. The Fidelity Mutual Life Ins. Co. vs. Jennie M. Smythe, *et al.* Issued 15 day of Octo. A. D. 1904. J. H. Finks, clerk, by —— ——, deputy. Commission to take the testimony of Will F. Davis, witness for comp't. Opened and filed — day of —— A. D. 189–. —— —— clerk, by —— —— deputy.

Witness fee	$1.50	P'd by M. E. Locke.
Notary fee	2.00	" " " "
Circuit clerk fee	3.50	" " " "

The last item is for transcripts.

JORDAN STOKES, JR., N. P.

376 In the Circuit Court of the United States for the Northern District of Texas, at Dallas. In Equity.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, WILLIAM H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Plaintiffs. } No. 597.

I, Edward T. Rice, who was specially appointed an examiner in the above styled cause, by order of the court, made August 8, 1904, do hereby certify that at ten o'clock in the forenoon of Monday, September 26, 1904, in my office, in room 833 of the First National Bank building, in Birmingham, Alabama, I was attended by Mr. Maurice E. Locke of counsel for the plaintiff, and by Mr. R. N. Bell, special counsel for the defendants, for the purpose of examining witnesses in said cause, orally, in accordance with the provisions of the sixty-seventh rule in equity, and other relevant rules and statutes, and in pursuance of said order.

Thereupon the plaintiff called as a witness J. R. TATE, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by counsel, and gave answers and testimony as follows:

Testimony of J. R. Tate.

Direct examination by Mr. LOCKE:

377 Q. Please state your name, age, occupation and place of residence?

A. Joseph R. Tate; age 32; attorney at law; Brookside, Alabama.

Q. In what county and how far and in what direction from Birmingham is Brookside located?

A. Brookside is fifteen miles northwest of Birmingham, in Jefferson county, Alabama.

Q. About what is the normal population of Brookside?

A. The town of Brookside is about two thousand to three thousand inhabitants.

Q. What is the principal industry in Brookside and the immediate vicinity?

A. The mining of coal.

Q. How long have you resided at Brookside?

A. Since the 14th day of August, 1895.

Q. Please state whether you are acquainted with one William A. Hunter, who, in April, 1904, was tried in the criminal district court

of Dallas county, Texas, on the charge of swindling the Fidelity Mutual Life Insurance Company?

A. I know the man tried in April, 1904, in Dallas county, Texas but know him as William A. Hunt.

Q. Please state whether or not you were present at that trial and saw the prisoner in the course of the trial?

A. I was present at the trial above referred to and saw the prisoner in attendance at said trial.

Q. When did you become acquainted with this man William A. Hunter or William A. Hunt, as you knew him?

A. My recollection is that it was in the fall of 1898.

Q. Please state how and under what circumstances and in connection with what transaction you formed his acquaintence?

(The defendant objects to the last question, because it is irrelevent, illegal and immaterial.)

378 A. In the fall of 1898, Mr. Hunt came to me, in Brookside, and wanted to rent a stable for his horse. I rented the stable to him for his horse, and also a feed-house.

(The defendant moves to exclude the answer of the witness, because it is irrelevant, illegal and immaterial.)

Q. Please state under what name the man of whom you speak introduced himself to you on that occasion?

A. I do not recollect his giving a formal introduction of himself, but informed me that his name was W. A. Hunt.

Q. Please state whether this man W. A. Hunter or Hunt was thereafter a resident of Brookside, and if so, for how long a time.

A. He was a resident of Brookside from then until he was arrested here in Birmingham, on April 27, 1903.

Q. During the time of his residence in Brookside, where did he reside with reference to the location of your office?

(The defendants object to this question, because it is irrelevant, illegal and immaterial.)

A. From January, 1899, he lived in a room back of my office and in the same building, the office only having the two rooms.

(The defendants move to exclude the answer of the witness because it is irrelevant, illegal and immaterial.)

Q. In what occupation was Hunter, alias Hunt, engaged, during the time of his residence in Brookside?

A. He was agent of the Singer Manufacturing Company, selling the sewing machines and doing the business of that company in that vicinity.

Q. Under what name — he go, while residing in Brookside?

A. Under the name of W. A. Hunt.

Q. When did you first learn that his real name was William A. Hunter and not Hunt?

(The defendants object because it is irrelevant, illegal and immaterial.)

A. The first I knew of it and learned of it was through the
379 papers, when he was arrested.

(The defendants move to exclude the answer of the witness, because it is irrelevant, illegal and immaterial.)

Q. Please state what, if any, office or offices you held in the year 1899, and especially in the months of July and November, 1899?

(The defendants object because it is irrelevant, illegal and immaterial, and because there is better evidence of the office he held, if any.)

A. My recollection is that I was mayor of Brookside and notary public.

(The defendants move to exclude the answer of the witness, because it is irrelevant, illegal and immaterial, and because it is not the best evidence.)

Q. Please state whether you were at that time acting as a notary public and performed the duties of that office?

(The defendants object to the question propounded to the witness, because it is irrelevant, illegal and immaterial.)

A. I was.

(The defendants move to exclude the answer, because the same is irrelevant, illegal and immaterial.)

Q. Please state whether on or about the 17th day of July, 1899, you, in your capacity as a notary public, took the affidavit of William A. Hunter, alias W. A. Hunt, to an account against J. I. and A. W. Newsom, in connection with his suit against those parties, brought in Nashville, Tennessee?

(To this question the defendants object because it is illegal, irrelevant and immaterial, and because there is better evidence of the making and certifying the affidavit referred to.)

A. I did.

(The defendants move to exclude the answer of the witness, because the same is irrelevant, immaterial and illegal, and because there is better evidence of the taking and certifying of the affidavit.)

380 Q. Under what name did the man of whom you speak make affidavit to said account?

A. Under the name of W. A. Hunt.

Q. Please state whether the man who made the affidavit to said account was the same man who was tried in Dallas county, Texas,

for swindling, under the name of William A. Hunter, a- you have testified heretofore?

A. He was.

Q. Please state whether, in the said suit of William A. Hunter against J. I. and A. W. Newsom, pending in Nashville, Tennessee, you took his deposition on or about November 25, 1899, and if so, state under what name he gave his testimony and deposition.

(To this question the defendants object, because it is irrelevant and immaterial, and because there is better evidence of the name under which the deposition was taken.)

A. Yes, I took his deposition on or about that time, in said suit, and under the name of W. A. Hunt.

Q. Please state whether the man, whose deposition you took on that occasion, under the name of W. A. Hunt, was the same man whom you saw on trial in Dallas county, Texas, as you have testified heretofore?

A. Yes, sir, he was the same man.

Q. I hand you for examination a certified copy of various papers and records in the case of W. A. Hunt, against J. I. and A. W. Newsom, made September 24, 1904, by B. R. Webb, clerk of the circuit court of Davidson county, Tennessee; please examine the account and the deposition contained in said certified copy, and state from such examination and from your memory of the account and deposition sworn to before you by W. A. Hunter, alias W. A. Hunt, whether the same are substantially correct copies of said original account and original deposition?

(And to this the defendants object to the witness examin-
381 ing the certified copy of the papers handed him, because it is not an original, and because the witness is not shown to be familiar with the handwriting of the maker of the paper, and because there is better evidence of the deposition, and because the evidence called for from the witness is irrelevant, illegal and immaterial, and because there is better evidence than the witness's testimony.)

A. They are, in my opinion.

(The defendants move to exclude the answer, on the same grounds as he specified in his objection to the question.)

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or to the matters in question in said cause? If yea, set forth the same fully and at large in your answer.

A. Yes; I wrote some notes and mortgages for Hunt, given to him under that name, and signed as security for him for fifty dollars, one note, payable to *to* W. A. Hunt.)

(The defendants move to exclude the answer of the witness, to th

last question, because said answer is not material evidence in this cause, and because it is illegal and irrelevant to the questions at issue, and not responsive to the question.)

Cross-examination.

By Mr. BELL:

Q. Did you know Mr. Hunt's character up to the time of his arrest, in the neighborhood of Brookside?
A. Yes.
Q. Was it good or bad?
A. It was good.
Q. Did Mr. Hunt, during the time that you knew him, and before his arrest, mix with a great many or a few people in that community?
A. He mixed with a great number of people.
Q. Did you know his sister, Mrs. Jennie M. Smythe?
A. No, sir, I did not.
382 Q. Did she live at Brookside?
A. No, sir, she did not.
Q. Had you learned or heard of any litigation between Mrs. Smythe and the Fidelity Mutual Life Association, before the arrest of Hunt?
A. No, sir.

Redirect examination.

By Mr. LOCKE:

Q. Please state whether you are acquainted with Mr. Bell, who has been conducting the cross-examination?
A. Yes, sir, I am.
Q. Please state whether he is a member of the firm of Shugart & Bell, attorneys at law, in Birmingham, Alabama?
A. Yes, sir, that is my understanding.

JOSEPH R. TATE.

I do further certify, that the testimony so given by the said witness, J. R. Tate, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said witness, and was signed by the said witness in my presence, and in that of both the counsel above named, the genuine signature of said witness appearing above.

Thereupon the plaintiff called as a witness, J. S. CAMBRON, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was examined orally by counsel, and gave answers and testimony as follows:

Testimony of J. S. Cambron.

Direct examination.

383 By Mr. LOCKE:

Q. Please state your name, age, occupation and place of residence?

A. My name is J. S. Cambron; 52; coal miner, Brookside, Jefferson county, Alabama.

Q. Please state whether you were present at the trial of William A. Hunter, in the criminal district court of Dallas county, Texas, in April, 1904, upon a charge of swindling the Fidelity Mutual Life Insurance Company, and whether you saw Mr. Hunter, the defendant, on that trial.

(The defendants object to this question, because it is irrelevant, immaterial and illegal.)

A. I was, and I saw the defendant.

Q. Please state whether you were acquainted with the man on trial in said court, at that time?

A. I was.

Q. Please state when and where you formed his acquaintance?

A. I formed his acquaintance in Brookside, in 1898, I believe.

Q. How long did your acquaintence with him continue, and how often did you see and converse with him?

A. I was with him, to the best of my recollection, pretty nearly every day, until his arrest in Birmingham.

Q. Under what name did you know him?

(The defendants object to the question, because it is irrelevant, illegal and immaterial.)

A. W. A. Hunt.

(The defendants move to exclude the answer, on the grounds stated in the objection to the question.)

Q. When did you for the first time learn, or in any way hear or suspect that his real name was not W. A. Hunt?

(The defendants object to the above question, because it is illegal, irrelevant and immaterial.)

384 A. My first knowing of it was through the papers in Birmingham telling of his criminal arrest.

(The defendants move to exclude the answer for the reason given in the objection to the question.)

Q. In what business was Hunter, alias Hunt, engaged during the time of his residence in Brookside?

A. He was engaged in the selling of sewing machines.

Q. Under what name was he generally known in that community?

(The defendants object to this question, because it is illegal, irrelevant and immaterial.)

A. W. A. Hunt.

Q. Please state whether Hunter, alias Hunt, ever told you while you knew him in Brookside and before his arrest, where he had been living during the two years preceding his coming to Brookside, and in what business he had been engaged during that time; and if he did, please state what he said to you on this subject?

(The defendants object to the question, because the same is illegal, irrelevant and immaterial.)

A. He told me that he lived in Tennessee, and had worked in the nursery business; and from there had gone to Atlanta in the sewing machine business, working for the Singer Manufacturing Company; and from that place had gone to Brookside, in the same business.

Q. If he told you at what point in Tennessee he was engaged in the nursery business, please state what he said on this subject.

A. Near Nashville; I do not believe he named the county.

Q. Do you know, or can you set forth, and other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or to any of them, or which may be material to the subject of this, your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. That's all.

385 Cross-examination.

By Mr. BELL:

Q. Did you know W. A. Hunt's general character at Brookside?

A. Yes, I knew his character.

Q. Was it good or bad?

A. It was good.

Q. Did you know his general reputation for truth and veracity, in that neighborhood,—in Brookside?

A. His reputation for truth and veracity was good.

Q. How long did you say you knew him before his arrest?

A. I knew him from 1898 to 1903, up to the time of his arrest in Birmingham.

Q. I will ask you whether you ever heard of his being charged with any crime or offense, other than the one of which you speak in your direct examination, when he was tried in Dallas county, Texas?

A. I never did.

Redirect examination.

By Mr. LOCKE:

Q. Please state, if you know, whether, before the arrest of Hunter, alias Hunt, in Birmingham, April 27, 1903, it was or was not a matter of general reputation, in Brookside, that he had committed a perjury in the case of the State of Alabama against R. D. Coffman, wherein Coffman was charged with murder?

(To that question the defendants objected, because it is illegal, irrelevant and immaterial, and because the plaintiff thereby seeks to contradict his own witness.)

A. I have heard some men say so.

(The defendants move to exclude the answer, upon the same grounds as are assigned to the question.)

J. S. CAMBRON.

386 I do further certify, that the testimony, so given by the said witness, J. S. Cambron, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said witness, and was signed by the said witness in my presence and in that of both the counsel above named, the genuine signature of said witness appearing above.

I do further certify, that the testimony of the said witness- J. R. Tate and J. S. Cambron, on the foregoing eleven pages of their depositions, has been retained by me in my possession until this moment, and that I am now sealing and addressing said depositions for transmission by mail to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony of all of which, I have hereunto set my hand, at Birmingham, in Jefferson county, Alabama, this the 26th day of September, A. D. 1904.

EDWARD T. RICE,
Special Examiner.

Received of Maurice E. Locke, Esqr., counsel for plaintiff in the above styled cause, seven and 20/100 ($7.20) dollars, as my fees, as special examiner, in taking and certifying the foregoing depositions.

This, the 26th day of September, A. D. 1904.

EDWARD T. RICE,
Special Examiner.

Indorsed as follows: 597. Filed Dec. 24, 1904. J. H. Finks, clerk.

387 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

PHILADELPHIA, PA., September 21st, 1904.

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388 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

I, Charles H. Guilbert, who was specially appointed an examiner in the above styled cause by order of the court made August 8th, 1904, do hereby certify that at ten o'clock in the forenoon of Wednesday, September 21st, 1904, at the office of the Fidelity Mutual Life Insurance Company, at Nos. 112 to 114 North Broad street, in Philadelphia, Pennsylvania, I was attended by Maurice E. Locke, Esquire, of counsel for plaintiff, for the purpose of examining witnesses in said cause orally, in accordance with the provisions of the sixty-seventh rule in equity, and other relevant rules and statutes, and in pursuance of said order, I do further certify that no appearance was entered in behalf of the defendants or any of them.

C. H. GUILBERT,
Notary Public.

[SEAL.]

Commission expires April 21, 1905.

Thereupon, the plaintiff called as a witness Miss EVALENE A. KILGORE, who having been by me carefully examined and duly sworn to testify the truth, the whole truth, and nothing but the truth, was questioned orally by counsel and gave answers and testimony as follows:

389 Testimony of the Witness Miss Evalene A. Kilgore.

Direct examination.

By Mr. LOCKE:

Q. Please state your name and place of residence?

A. My name is Evalene A. Kilgore. I reside 3920 Haverford avenue, West Philadelphia, Pennsylvania.

Q. State in what occupation you are now engaged?

A. I am operating a Fisher typewriting machine.

Q. In whose employ are you?

A. I am in the employ of the Fidelity Mutual Life Insurance Company.

Q. In what occupation were you engaged in the months of October and November, 1896?

A. I was copyist in the policy department of the Fidelity Mutual Life Association of Philadelphia.

Q. I hand you a paper which purports to be policy No. D 73,374 issued by the Fidelity Mutual Life Association of Philadelphia on the life of William A. Hunter in the amount of $5000 in favor of Jennie M. Mettler, and bearing date October 31st, 1896. Attached to said policy is what purports to be a copy of the application upon which said policy was issued. Will you kindly examine said purported copy of the application and state if you know in whose handwriting the manuscript portion thereof is written?

A. It is in my handwriting.

Q. Please state from what instrument that copy was made?

A. I made this copy from the original application.

Q. From what source did you receive the original application when you made the copy?

A. Coming from the policy department of the Fidelity Mutual Life Association.

Q. Please state whether or not it was a part of your regular duty to make accurate copies of original applications for insurance and attach the same to the policies written in pursuance of such applications?

390 A. That was my duty.

Q. Please state whether the copy which you have identified as having been made by yourself was carefully compared with the original before the policy was issued and whether the same was found to be a true and correct copy?

A. I think so, yes, sir.

Q. Please state whether the printed matter appearing in said copy

attached to policy No. D 73,374 is a correct copy of the printed matter appearing in the original application?

A. It is a correct copy, yes, sir.

By the EXAMINER:

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I have nothing further to add.

EVALENE A. KILGORE.

I do further certify that the testimony so given by the said witness, Miss Evalene A. Kilgore, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

C. H. GUILBERT,
Notary Public.

[SEAL.]

Commission expires April 21, 1905.

Thereupon the plaintiff called as a witness OLIVER C. BOSBYSHELL, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth,
391 in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness Oliver C. Bosbyshell.

Direct examination.

By Mr. LOCKE:

Q. Please state your name, age, residence and occupation.

A. My name is Oliver C. Bosbyshell; I am sixty-five years of age; I reside at 236 South Forty-fourth street, Philadelphia.

Q. What official connection, if any, do you sustain with the Fidelity Mutual Life Insurance Company?

A. I am treasurer of the company.

Q. How long have you held that position?

A. Since the first of April, 1893.

Q. About when did the Fidelity Mutual Life Insurance Company assume its present name?

A. August, 1899.

Q. Please state whether you sustained the same relationship to said corporation under its former name, the Fidelity Mutual Life Association of Philadelphia.

A. I did from the time stated.

Q. Please state whether said corporation, under its former name, of the Fidelity Mutual Life Association ever issued any policy or policies of life insurance upon the life of one William A. Hunter of Pecos, Texas?

A. Yes, sir; it did.

Q. Please state how many policies were so issued by said company, and state under what date or dates they were issued and give the serial number and amount of each policy.

A. There were three policies issued. They were issued under the date of October 31st, 1896, and numbered respectively D 73,372

392 D 73,373, and D 73,374, for $5,000 each.

Q. Please state whether you have now before you the original policies mentioned in your last preceding answer?

A. Yes, sir; I have.

Q. Please state whether those are the three policies upon which Mrs. Jennie M. Mettler brought suit No. 2118 in the circuit court of the United States for the northern district of Texas against the Fidelity Mutual Life Association, and recovered a judgment for something over $20,000 in 1900?

A. These are the policies on which that suit was brought.

Q. Please state whether your genuine signature appears upon each of said policies, and, if so, where and in what capacity?

A. Yes, sir. My signature as treasurer appears upon each of the policies directly underneath the president's signature on the face in its proper place.

Q. Please state whether the Fidelity Mutual Life Insurance Company, under its proper name ever paid the principal and interest of the judgment recovered by Mrs. Jennie M. Mettler against the Fidelity Mutual Life Association of Philadelphia, and if so, state when and how it paid the same. If by check, give the date, number and amount of the check, and state in whose favor it was drawn and on whom it was drawn, and state who signed it in behalf of the company?

A. The Fidelity Mutual Life Insurance Company issued its mortuary check No. 3505 on the 29th of May, 1902, in favor of J. H. Finks, clerk of the United States circuit court, Dallas, Texas, in full of the judgment in the case of Mettler *vs.* Fidelity Mutual Life Association, with interest thereon to June 4th, 1902, for $24,028.25 on the Real Estate Trust Company of Philadelphia, signed by myself, O. C. Bosbyshell, treasurer, and F. X. Quinn, assistant secretary.

Q. Please state whether you have now before you the original check which you have just described?

A. I have the check now in my hand.

Q. Is the signature O. C. Bosbyshell attached to said check

393 your genuine signature?

A. It is.

Q. Please state whether said check was duly paid and charged to

the account of the Fidelity Mutual Life Insurance Company by the Real Estate Trust Company?

A. Yes, sir; it was. It was returned to us in our regular settlement.

By the EXAMINER:

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I do not know anything else that I can say on this subject.

OLIVER C. BOSBYSHELL.

I do further certify that the testimony so given by the said witness, Oliver C. Bosbyshell, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

[SEAL.] C. H. GUILBERT,
Notary Public.

Commission expires April 21, 1905.

Thereupon the plaintiff called as a witness HARRIE H. FOUSE, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness Harrie H. Fouse.

394 Direct examination.

By Mr. LOCKE:

Q. Please state your name and place of residence?

A. Harrie H. Fouse, 4335 Pine street, Philadelphia, Pa.

Q. What, if any, business relationship do you sustain to The Fidelity Mutual Life Insurance Company, the plaintiff in this cause?

A. The office superintendent of the Fidelity Mutual Life Insurance Company.

Q. Please state, in a general way, the character of your office and the nature of your duties.

A. I have charge of the clerical force of the general office of the company, in connection with the care of the policy records, being directly responsible for the same.

Q. Please state whether a search has been made under your supervision among the papers and files of the plaintiff company for

the original application of William A. Hunter for $15,000 of insurance upon his life in favor of his sister, Jennie M. Mettier, upon which application the plaintiff company issued its three policies Nos. D 73,372, D 73,373 and D 73,374?

A. Such search was made.

Q. Please state whether said original application was found among the papers of the plaintiff company?

A. It was not.

Q. Please state whether said original application is now in the possession or control of the plaintiff company and whether you know its present whereabouts.

A. It is not in the possession of the company and no trace can be found of the same.

Q. What is the latest trace you have been able to find of the presence of said application in the office of the plaintiff company and of the disposition made of it?

A. The records of the company show that said application
395 was forwarded to Messrs. Perkins, Gilbert and Perkins, of Dallas, Texas, on May 25th, 1898, and that said application was never returned to this office.

By the EXAMINER:

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I have nothing further to add.

HARRIE H. FOUSE.

I do further certify that the testimony so given by the said witness, Harrie H. Fouse, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

C. H. GILBERT,
Notary Public.

[SEAL.]

Commission expires April 21, 1905.

After the examination of the witness Harrie H. Fouse, the examination was adjourned to be resumed at the same place at two o'clock p. m. of the same day.

Pursuant to adjournment I was again attended at the same place and by the same counsel above mentioned at two o'clock p. m. in the afternoon of this day.

Thereupon the plaintiff called as a witness L. G. FOUSE, who having been by me carefully examined and duly sworn, to testify
396 the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness L. G. Fouse.

Direct examination.

By Mr. LOCKE:

Q. Please state your name and place of residence?

A. My name is L. G. Fouse; I reside 3613 Baring street, Philadelphia.

Q. What official connection, if any, do you sustain with the plaintiff, The Fidelity Mutual Life Insurance Company?

A. I am president of the company, and have been since its organization, in 1878.

Q. How long has it been doing business under its present corporate name?

A. Since August, 1899.

Q. What was its corporate name previous to that time?

A. The Fidelity Mutual Life Association from January third, 1882, and theretofore the Fidelity Mutual Aid Association.

Q. In what way was the change of name from the Fidelity Mutual Life Association to the Fidelity Mutual Life Insurance Company brought about?

A. Under the provisions of the act of incorporation, which prescribed the manner in which the title of the corporation should be changed, which was complied with by amendment of charter as provided under the act of incorporation.

Q. Did you sustain the same relation to the corporation under its former names as that which you bear to it under its present name?

A. Yes, sir.

Q. Please state whether you remember the occurrence of the issuance of three policies of life insurance by the Fidelity Mutual Life Association upon the life of one William A. Hunter and of a
397 claim made upon the association under said policies by Mrs. Jennie M. Mettler, the beneficiary therein.

A. I do.

Q. I hand you a letter written in black ink on a single sheet of note paper, dated at Pecos, Texas, January 2d, 1897, addressed to the Fidelity Mutual Life Association of Philadelphia, and signed in the name of Jennie M. Mettler, which bears a rubber stamp "Received" and date of January 8th, 1897. Please examine this letter and state when and from whom, if ever, the Fidelity Mutual Life Association received said letter.

A. The letter you handed to me was received in due course of mail from Mrs. Mettler, by the plaintiff company.

Q. I hand you a printed and written paper headed "Proof of death and justness of claim submitted to the Fidelity Mutual Life Association of Philadelphia, Penna.," and signed in the name of Jennie M. Mettler. Please state whether said paper was ever received by said association, and, if so, when, how and from whom?

A. It was received February 2d, 1897, from Mrs. Jennie M. Mettler.

Q. I hand you a paper in six sheets headed "Supplementary proof of loss submitted by the Fidelity Mutual Life Association under policies Nos. D 73,372-3 and 4," signed in the name of Jennie M. Mettler. Please examine the same and state whether it ever was received by the Fidelity Mutual Life Association, and, if so, when, how and from whom?

A. The paper handed me was forwarded by Mrs. Mettler as part of the proofs and received by the plaintiff company February 2nd, 1897.

Q. Please state at what conclusion the plaintiff company arrived as to the justness of the claim made by Mrs. Mettler, and state, in a general way, what efforts were made, if any, to ascertain whether, in fact, William A. Hunter was dead, covering in your statement the period of time elapsing between the date of his disappearance on December 3rd, 1896, and the date of the trial of Mrs. Mettler's suit against the plaintiff, which occurred in May 1900.

398 A. On receiving the proofs submitted by Mrs. Mettler we reviewed the same carefully and reached the conclusion that Hunter had not drowned, as alleged, because the physical conditions for such an accident were highly improbable, and the fact that the one horse was tied to a bush close to the wagon, that the other horse was found at some distance near a railroad station and passed through three gates, that according to the investigation had been closed, and that the hand bag disappeared, which he was not liable to have on his person, taking into account the climate and conditions of the weather, that instead of its being a case of accident, was a case of disappearance. Having reached that conclusion, we governed ourselves accordingly, and followed up every possible clue for the purpose of finding him. Among the several efforts made was one at Nashville, Tennessee, resulting from a communication received from a person by the name of D. G. Wallace, who stated that he had met Hunter in that city, and we immediately proceeded to attempt to locate him. All the hotel registers were examined, and a thorough search was made, but without result. As an illustration of the several efforts made, I will state that we read in a weekly paper published at Farmington, New Mexico, that one W. H. Hunter had exhibited some crude oil that he obtained in a meadow. We sent an inspector to Farmington, which required a stage trip of many miles, and involved a heavy expense with the result that it was not as we thought it might be, W. A. Hunter. The aggregate expense involved in the search was in the neighborhood of $5000

without counting the salaries, which would probably increase the expenditure to twice that sum.

Q. Through what period of time did the plaintiff company prosecute its search for Mr. Hunter, or for definite and positive evidence that he was still living?

A. Beginning with the time of the submission of the proofs, notwithstanding the verdict of the jury to the contrary, we believed that he was living, and never ceased to prosecute the search until he was found.

399 Q. When did the plaintiff company first learn that Mr. Hunter had changed his name and assumed a fictitious name?

A. The first information we had of that was when we learned of his arrest at Birmingham, Alabama, April 27th, 1903.

Q. Please state what, if any, evidence the plaintiff in this suit had been able to obtain up to the time of the trial of Mrs. Mettler's suit against the association in May, 1900, tending to show that William A. Hunter was not drowned, and which evidence was not made use of by it upon said trial.

A. None whatever.

Q. When and how did the plaintiff company for the first time learn definitely and positively that Hunter was still living?

A. At the time of his identification in a jail at Birmingham, Alabama, by A. J. Brown and H. B. Taylor, about the 29th of April, 1903.

Q. What, if any, evidence of the fact that Hunter was still living did the plaintiff company obtain between the time of the trial of Mrs. Mettler's suit against the company in May, 1900, and the time of its payment of the judgment obtained by Mrs. Mettler against it in June, 1902?

A. None. We were still prosecuting the search, but up to that time had obtained no additional evidence.

Q. Please state, in a general way, what efforts were made by the company to follow up the clue afforded by the report that D. G. Wallace had seen Hunter in Nashville, Tennessee, and through what agencies such efforts were prosecuted?

A. We requested our then representative, Mr. R. A. Henry, at Nashville, to prosecute an investigation, and also the legal firm of Stokes & Stokes to do the same, and to act for the company, and on several occasions we sent inspectors of the company to make investigations.

By the EXAMINER:

400 Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I have nothing further to add.

L. G. FOUSE.

I do further certify that the testimony so given by the said witness, L. G. Fouse, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in the of such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

C. H. GUILBERT,
Notary Public.

[SEAL.]

Commission expires April 21, 1905.

I do further certify that I have retained in my possession until this moment the depositions of the witnesses hereinbefore named and that I am now sealing and addressing the same for transmission by mail to the circuit court of the United States for the northern district of Texas at Dallas.

In testimony of all of which I have hereunto set my hand at Philadelphia, Pennsylvania, this twenty-first day of September A. D. 1904.

C. H. GUILBERT,
Special Examiner, Notary Public.

[SEAL.]

Commission expires April 21, 1905.

Indorsed as follows: 597 Eq. Filed Dec. 24, 1904. J. H. Fink clerk.

401 In the Circuit Court of the United States for the Northe District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
vs.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 59

I, Charles C. Cooper, who was specially appointed an examiner the above styled cause by order of the court made August 8th, 19 do hereby certify that at 9 o'clock in the forenoon of Tuesday, S tember 13th 1904, at my office in the court house in Newark, Licki county, Ohio, I was attended by Mr. Maurice E. Lock, counsel the plaintiff, and by J. W. Horner and John David Jones spec counsel for the defendants for the purpose of examining witnesses said cause, orally, in accordance with the provisions of the 67th r in equity and other relevant rules and statutes and in pursuanc said order.

Thereupon, the plaintiff called as a witness A. J. WILSON, who having been by me carefully examined, and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally, by counsel, and gave answers and testimony as follows:

Testimony of the Witness A. J. Wilson.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence?
A. My name is A. J. Wilson, age 64, place of residence Utica, O.
Q. In what occupation are you engaged?
A. A banker.
Q. What is the style of your bank?
A. Independent bank, not chartered.
Q. It is called Wilson's bank?
A. Yes sir, Wilson's bank.
402 Q. Please state whether in 1902 and 1903, you were acquainted with a lady whose name was then Jennie M. Metler and whose name is now Jennie M. Smythe?
A. Very slightly, I never knew her until this transaction.
Q. Please state whether in 1902 or 1903, she had a deposited account at your bank?
A. She had.
Q. When did she open that account?
A. July 2nd 1902.
Q. What was the amount of her deposit?
A. $11,160.50.
Q. In what form was that deposit made?
A. It was in exchange, and I think on New York; on a New York bank.
Q. How where these drafts received by you?
A. They were received from her.

Question objected to by counsel for defendants on the ground that the question assumes the existence of any draft and also defendants' counsel object to the answer to the preceding question on the ground that the exchange is not produced.

Q. What became of the drafts that were received by you on deposit?

Same objection by defendants.

A. The drafts were sent to New York, of course, for collection.
Q. Were they paid?
A. Yes sir.
Q. How long have you been engaged in the banking business.
A. 32 years.
Q. Are you familiar with the usages and customs of that business?

A. I think so.

Q. Under the regular usages and customs of the banking business, in whose custody do checks and drafts finally remain after their payment by the drawee banks?

Objected to as being irrelevant.

A. They are returned to the bank that issued them.

403 Q. Please state whether the drafts that were deposited with you by Mrs. Mettler are now in your custody?

A. No sir.

Q. When did Mrs. Mettler close her account with your bank?

A. The 30th day of April 1903.

Q. What was her balance on that date?

A. $7,134.17.

Q. Please state whether she withdrew the full amount of her balance on that date, and if so in what form she took the amount.

A. She did; in currency.

Q. Please state whether she called in person to close her account, or whether she closed it by check in favor of one or more third parties.

A. In person.

Q. Please state whether you suggested to her that she take a portion of the amount due her in the form of exchange. And if you did, state what was her response.

Objected to on the ground that the question is suggestive and leading.

A. My recollection is I asked her if she didn't want it in exchange and she said not.

Q. Please state whether you have with you a statement of the amounts credited and charged to the account of Mrs. Mettler by your bank.

A. I have.

Q. Please hand this statement to the examiner to be marked Exhibit A and attached to your deposition. (The paper above referred to was here handed to the examiner by the witness; it is hereto attached; marked Exhibit A and made a part hereof.)

Counsel for defendants object to said paper as being incompetent.

Q. Please state whether said statement, marked Exhibit A exhibits correctly the transaction had by your bank with Mrs. Mettler.

A. Yes, sir.

404 Q. In the second column of the paper marked Exhibit A. I find sundry names of persons, what do these names indicate?

A. They indicate the names on the checks as paid.

Q. What names? Drawees or payees, or signers?

A. I understand that she is the drawer, and paid to these parties named here.

Q. Do you mean that the money was actually paid to the parties named in Exhibit A, or that these were the parties in whose favor the checks were originally drawn?
A. Paid to them or their order.
Q. How many deposits did Mrs. Mettler make in your bank?
A. Two.
Q. What was the second deposit? and when was it made?
A. January 2nd 1903, $145.67.
Q. How many withdrawals of money did Mrs. Mettler make while she maintained an account in your bank?
A. She issued fourteen checks.

A. The plaintiff now offers in evidence the paper marked Exhibit A. Chas. C. Cooper.

The defendants object to the paper offered, because it is incompetent as testimony, and defendant- asks now to examine the witness in reference to the paper before proceeding further.

Cross-examination.

Examined by J. D. JONES:

Q. In the conduct of your banking business up there in Utica, who does the business in the bank? I mean who transacts the business?
A. I am the banker, but I have 2 clerks.
Q. Who are they?
A. Miss C. B. Clark and R. L. Montagna.
Q. Did you have those clerks during the running of this account with Mrs. Mettler or Mrs. Smythe?
A. Yes sir.
405 Q. The same clerks.
A. Yes sir.
Q. What were the duties of those two clerks?
A. Well, the young man keeps the books principally, and the girl acts as cashier in my absence.
Q. During the time from July 26th 1902 to Ap'l 30, 1903, how much of the time were you present in the bank?
A. I can't say.
Q. Well, about what portion of the time.
A. Most of the time.
Q. Whose duty was it to pay checks and receive money on deposit or otherwise in your bank, and who attended to that duty principally?
A. I think Miss Clark did. Takes more deposits and pays more checks than any other person.
Q. State, from recollection, the amount of Mrs. Mettler, or in the name of Mrs. Mettler, in your bank, giving dates and amounts of deposits and payments on checks?
A. I can't give it.

Q. How did you obtain this statement that you have handed to the examiner?

A. A copy of our books.

Q. And these books were kept by your clerk, Mr. Montagna?

A. Principally.

Q. You have no definite recollection of these transactions, except as they are taken in this statement from the book?

A. No sir.

Redirect examination.

Examined by Mr. LOCKE:

Q. Please state whether the transaction of the opening of Mrs. Mettler's account came within your personal observation.

A. It did.

Q. Please state whether the transaction by which Mrs. Mettler's account was closed was had by her with you personally.

406 A. I was there at the time.

Q. Did you have the transaction with her?

A. In part.

Q. With whom did she have her conversation on the occasion of the closing of her account?

A. In common with all of us in the office.

Q. Please state whether Mrs. Mettler accepted the sum of $7,134.17 paid her as being the full amount of the balance due her.

Objected to by counsel for defendants as involving a conclusion and not a fact.

A. Yes, sir.

Q. What disposition was made of the checks which Mrs. Mettler had drawn on your bank up to the time of closing her account.

A. They were given up to her.

Q. Are they now in your custody?

A. No, sir.

Q. Please state whether you have ever seen any of them since they were delivered to her?

A. I have not.

Q. Plaintiff now requests counsel for the defendant- to produce this afternoon the original checks drawn by Mrs. Mettler on A. J. Wilson's bank.

Recross-examination.

By J. S. JONES:

Q. State what connection you had personally with the origi-

407 nal deposit of Mrs. Mettler in your bank. What connection you had personally with that deposit.

A. I was there when the deposit was made.

Q. Is that all the connection you had with it?
A. Yes sir.
Q. State what connection you had personally with the closing of that transaction.
A. I was there when that was done.
Q. Did you have any other connection with it.
A. I helped to count the money.
Q. How or by what agency was that final withdrawal accomplished? With what agency was that withdrawal accomplished.
A. It was done by check.
Q. To whom was that check delivered by Mrs. Mettler or Mrs. Smythe.
A. I can't say whether it was given to me or whether it was given to Miss Clark.
Q. What other connection did you have with it besides help to count the money?
A. I don't know of any other connection that I could have.
Q. How did you happen to ask her as you say you did if she didn't want a part of it in exchange?
A. That is a common question to ask in amounts of any size.

A. J. WILSON.

I do further certify that the testimony so given by the said witness, A. J. Wilson was reduced to typewriting by me as the same appears at large above and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named the genuine signature of said witness appearing above.

408 EXHIBIT "A."

Mrs. Jennie M. Mettler in Acc't with the Wilson Bank, Utica, Ohio.

DR.			CR.	
1902.			1902.	
July 26.	F. J. Hunter.	8	July 2. Dep	11,160.50
Aug. 2.	W. A. Hunter.....	185	1903.	
7.	" "	374	Jan. 2. Dep	145.67
15.	R. G. Munn.....	100		
Sep. 6.	City nat. bank	75		
27.	C. R. Hunter.....	700		
29.	Mrs. J. M. Mettler.	20		
Oct. 15.	C. E. Hunter.....	75		
25.	W. S. Weiant	1890		
Dec. 2.	Dr. C. E. Hunter...	100		
22.	Self	540		
1903.				
Jan. 28.	Dr. C. E. Hunter..	100		
Feb. 10.	J. H. McCahon....	5		
Apr. 30.	Self.....	7134.17		
		$11306.17		$11306.17

Exhibit "A." Chas. C. C. Cooper.

409 Thereupon the plaintiff called as a witness F. P. HOUSEHOLDER,

Who, having been by me carefully examined and duly sworn, to testify the truth the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

Testimony of the Witness F. P. Householder.

Direct examination.

Examined by Mr. LOCKE:

Q. Please state your name, age and place of residence.
A. My name is F. P. Householder, age 37, residence Utica O.
Q. In what occupation are you engaged?
A. Teaching school.
Q. How long have you lived in Licking county, and how long have you been engaged as a teacher?
A. I have lived in Licking county 36 years plus; I couldn't tell how long teaching school exactly; about ten years.
Q. What, if any, family relationship exists between yourself and the lady whose name was formerly Jennie M. Mettler and is now Jennie M. Smythe?
A. A brother-in-law.
Q. Did you marry her sister?
A. I did.
Q. What is the name of her present husband?
A. James Smythe.
Q. When were they married?
A. I can't tell you; it has been about a year I think; I wouldn't say for certain; about a year, I think.
Q. What relationship exists between William A. Hunter, Jr. and Mrs. Jennie M. Smythe?
A. I do not know.
Q. Please state whether you ever were personally acquainted with William A. Hunter, Jr.
A. No, sir.
410 Q. What relationship if any exists between William A. Hunter Sr. and Mrs. Jennie M. Smythe?
A. He is her father.
Q. Please state whether you remember the circumstances of William A. Hunter Jr. disappearing from Texas about December 1896, and of Mrs. Smythe, then Mrs. Mettler, suing an insurance company for insurance upon his life. Do you remember that circumstance?
A. I remember that she did, yes.
Q. Please state whether you gave your deposition in that case.
A. I did.
Q. Please state whether you testified in that case substantially that the family reputation was that William A. Hunter, Jr. had been drowned about Dec. 4, 1896.

Counsel for defendants object on the ground that the deposition itself is not produced.

A. I understand that to mean whether the family believed that he was drowned at that time.

Q. Yes.

A. I say I did. I testified that I believed he was dead, yes, sir.

Q. Did you testify also that was the general belief in the family

Same objection by defendants.

A. Yes, sir.

Q. Please state what was the origin of that reputation in your family and upon what grounds it was originally based.

A. By the letters that Mrs. Mettler wrote home.

Answer objected to by defendants, because the letters are not produced.

Q. Where was Mrs. Mettler at that time?

A. I can't name just where, she was in Texas some place.

Q. Please state whether the letters from Mrs. Mettler, to which you have just referred are now in your custody?

A. They are not.

Q. Do you know where they are?

A. No, sir.

411 Q. What was the general purport of those letters?

Objected to as incompetent.

A. I can't tell only this far that she stated there about his going to the Pecos river where he camped, where he got in.

Q. Did she described the appearance of his camp as found?

Same objection.

A. Yes sir.

Q. Please state whether she said in substance that William A. Hunter was drowned in the Pecos river?

Objected to for the same reason and because the question is leading.

A. She said she believed that he was drwoned from the appearance.

Q. Please state whether before William A. Hunter's disappearance on that occasion it had been his habit to maintain a family correspondence with the members of your family—your general family—the Hunter family in Licking county.

A. Not to my knowledge.

Q. Please state whether at any time between the date of his said disappearance and the time of giving your testimony in the suit above mentioned, William A. Hunter had written to any member of his family in Licking county, so far as you ever know or heard.

A. No, sir.

Q. Please state whether at any time since December 3rd, 1896, you ever have seen the said William A. Hunter Jr., or any person who claimed to be the said William A. Hunter, Jr.

A. I have not.

Q. Please state whether at any time since December 3rd 1896, you ever have seen any person who claimed to come as a messenger from William A. Hunter Jr. or to have seen him or talked with him.

A. No, sir.

Q. Please state whether, so far as you know, any other member of the general Hunter family in Licking county, has seen or talked with any person who claimed to be the bearer of a message from William A. Hunter Jr. since December 3rd, 1896.

412 Question objected to by defendants' counsel upon the ground that the question asks for hearsay.

A. No, sir.

Q. Please state whether any member of the family has spoken to you of having seen or talked with such a messenger, and if so, what member of the family?

Objected to by counsel for defendants *counsel* as being incompetent and irrelevant.

A. No, sir.

Q. Please state whether at any time between Dec. 3rd 1896 and April 27th 1903, you or so far as you know or have any reason to believe, any other member of the general Hunter family in Licking county except Mrs. Mettler received any message of any kind, oral, written or telegraphic, purporting to come directly or indirectly from William A. Hunter Jr., and if any such message was received state how, when and by whom it was received.

Same objection as the last by defendants' counsel.

A. No, sir.

Q. About how long was it after William A. Hunter's disappearance that you first learned that his life was heavily insured in favor of his sister Mrs. Mettler?

A. I answer just approximately, I couldn't say exactly think about 2 months.

Q. How did you receive this first information.

A. From the family.

Q. Do you know how the family first received information to this effect?

A. I do not.

Q. Please state whether you saw in the Newark Daily Advocate, issued on or about January 8th 1897, an item announcing the supposed drowning of William A. Hunter Jr. copied from the Utica Herald, or whether you saw such an article in the Utica Herald about that date.

413 Objected to by defendants' counsel as irrelevant and immaterial.

A. I saw it in the Advocate.

Q. Do you know how the information contained in that article was conveyed to the Advocate or the Utica Herald? If so, state how.

A. I saw the name of the man that was supposed to write it—Mr. Wallace.

Q. Perhaps you have misunderstood my question. I was referring to the article which first appeared announcing the supposed death of Mr. Hunter, and not the later article in which Mr. Wallace figured. Do you know how the information conveyed in the first article was conveyed to the newspaper?

A. No, sir.

Q. Please state whether you saw in the Newark Daily Advocate, issued on or about January 29th, 1897, an item stating in substance that one D. G. Wallace claimed to have seen William A. Hunter in Nashville, Tennessee.

A. I did.

Q. Please state whether after seeing that article you wrote to D. G. Wallace of Nashville, Tenn.

A. I did.

Q. Have you that letter now in your possession or control?

A. I have not.

Q. Please state as fully as you can from memory the substance of the letter which you wrote to Mr. Wallace.

Defendants object to the question on the ground that the letter is not produced.

A. I can tell you the substance I stated in there that I had seethis article; told him who I was; and asked him to give a description of this man who was supposed to be William A. Hunter; that is about all that I asked or stated.

Q. Please state whether you received from Mr. Wallace a reply to that letter.

414 A. I did.

Q. I hand you a pencil-written letter, written on both sides of a sheet of note-paper, marked Exhibit A, and attached to the deposition by yourself in the cause entitled Jennie M. Mettler *v.* The Fidelity Mutual Life Association pending in the circuit court of the United States for the northern district of Texas, and numbered 2118 on the docket of said court. Please examine said paper and state whether it is the original letter which you received from D. G. Wallace in answer to your letter or inquiry written him as you have stated above.

(Hands deposition and exhibit to witness.)

Objected to as irrelevant.

A. I believe it is.

Q. Please state whether you wrote to Mr. Wallace in reply to this letter.

A. I think not.

Q. Please state whether after seeing the above-mentioned item in the Newark Daily Advocate, or after receiving this letter from D. G. Wallace you addressed a letter to William A. Hunter, at Nashville, Tenn. or elsewhere.

A. I do not remember.

Q. Please state what, if any, steps you, or within your knowledge any other member of the general Hunter family of Licking county, took beyond the writing of your above-mentioned letter to Mr. Wallace, to ascertain whether, in fact, William A. Hunter was still alive and had been seen in Nashville Tennessee.

A. To my knowledge, not.

Q. Please state whether you communicated to any other members of the Hunter family the fact that you had written to Mr. Wallace and had received this reply from him.

A. I did.

Q. When and to whom did you make such communication?

A. One sister, Luella, was at my house at that time, and I sent the letter to the family.

415 Q. Please state whether you ever communicated the fact of your writing to Mr. Wallace and receiving this reply to Mrs. Mettler?

A. I did not.

Q. Please state whether any other member of the Hunter family communicated such fact to Mrs. Mettler, and if so state who did this, and when and how it was done.

Objected to on the ground that it is hearsay.

A. I cannot answer that. I do not know who did the writing, I know they did, because they said so, but I do not know who wrote the letter; I do*d* not know who informed me.

Q. What did you do with Mr. Wallace's letter after you received it?

A. I kept it for a while and then I sent it to—turned it over to the Hunter family.

Q. Do you know whether the letter written to you by Mr. Wallace was sent by any member of the Hunter family to Mrs. Mettler, if so, state what was the fact?

A. No, sir.

Q. Please state whether at the time of your correspondence with Mr. Wallace, it was known to the family in Licking county, that William A. Hunter's life was insured in favor of his sister Mrs. Mettler.

A. I do not know.

Q. Was it known to you?

A. No, sir.

Q. Please state when and how, if ever Mrs. Mettler ever communi-

cated to you, or so far as you know, to any other member of the family, before April 27th, 1903 the fact that after his supposed death she had collected a note held by William A. Hunter, and that she had found in the bank with the insurance policies on his life some $1500 of county script belonging to him, and had taken possession of the same.

Objected to by defendants on the ground that the question assumes facts which do not exist.

416 A. I do not know.

Q. Did she ever communicate such fact to you?

A. No, sir.

Q. Did she ever so far as you know, communicate it to any member of the family?

A. No, sir.

Q. Please read to the examiner, to be made a part of your testimony the letter above referred to, as attached as Exhibit A to your deposition in case of Mettler *vs.* The Fidelity Mutual Life Association.

Counsel for defendants object to this copy of the letter offered as testimony, on the ground of incompetency and irrelevancy of the matter.

A. (He reads:)

"NASHVILLE, TENN., Feb. 2/97.

Mr. F. P. Housholder.

DEAR SIR: Your letter at hand you want me to tell you about Will Hunter he is very near six foot high and a fine looking man I was in an store in this city I saw this Wm. Hunter I got a talking to him for I like his looks I says to him Whear are you from he told me Texas I then asked him if that was his home he told me no I then asked wheare was his home he told me Homer, Licking Co. I tooke him by the hand anfd told him I was from old Newark we was glad (Here follow several words that cannot be read because covered up in attaching the letter to the deposition) was three months ago. he don't seem to like Texas it is to- cold he thinks he told me he thought he would like Nashville better for it is warmer South. P. S. Now, Mr. Housholder if you have another Will Hunter that left Homer for Texas sometime ago this is not the one but if not this is the one and the same Will Hunter I saw Will Hunter of Homer on the street on the 22 of Jan. 1897. I told him what I saw in the Advocate he told me he would write and tell you wheare he was theare is no dough*t* but he is the same Will Hunter of Homer.

417 I will try and se- him again write and let me heare from you if you heard from him

Your friend,

D. G. WALLACE.

"216 Sycamore St.)"

Here an adjournment was taken to 1 o'clock p. m.

ONE O'CLOCK P. M.

Same parties present.

Examination of F. P. HOUSHOLDER resumed.

By Mr. LOCK-:

Q. Please state what steps, if any, within your knowledge Mrs. Mettler took after your correspondence with D. G. Wallace to ascertain whether it was a fact that William A. Hunter was still living and had been seen by Mr. Wallace in Nashville, Tenn.

A. None to my knowledge.

Q. Please state whether at any time before April 27, 1903, you received any communication written or oral, or telegraphic, from Mrs. Mettler in regard to her brother, William A. Hunter, and the question of whether he was alive or dead, If so, state when and how you received such communication and what was the same.

A. I never received any.

Q. Please state whether you ever have received any such communication or had any conversation with Mrs. Smythe, formerly Mrs. Mettler relative to her brother, William A. Hunter, since April 27th, 1903.

A. I have never received anything; I have talked with her about it—concerning William A. Hunter.

Q. When did you talk with her on this subject?

A. I cannot give dates. I have talked with her 2 or 3 times; I couldn't just give dates.

Q. Since his arrest?

A. Yes sir; I have talked with her 2 or 3 times; she was in my house once or twice when I talked to her.

418 Q. What did she say to you? About her brother on these occasions

A. Well, now, I couldn't tell you just what we talked; we talked in a general way about him, but just what she said I couldn't say.

Q. What did she say, if anything, about his being alive or dead?

A. I have to think about that. May I ask you a question?

Q. Yes,

A. When was the money paid to her?

Q. In June 1902. She deposited in bank in July 1902.

A. I can't remember the dates, when was Hunter arrested?

Q. April 27, 1903.

A. I couldn't tell what she said—as to whether he was dead or alive; I cannot remember that.

Q. When did you first suspect that William A. Hunter was still living, after Dec. 3, 1896?

Objected to by defendants, on the ground that it is irrelevant, and assuming a state of facts that does not exist.

A. The first time I would say was when I read that he was convicted and sentenced to 5 years in the penitentiary.

Q. Had you heard before you read of his conviction that he had been arrested?

A. Yes sir.

Q. But that aroused no suspicion in your mind that he was still living?

A. No, sir, I didn't believe he was living.

Q. What, if anything, did Mrs. Mettler ever say to you at any time before April 27, 1903, in regard to the distribution of the estate of William A. Hunter?

A. She never said anything to me about it.

Q. Mrs. Mettler received from the life insurance company something over eleven thousand dollars. Please state, if you know what disposition she made of that money.

And in what form the money or the proceeds thereof, in so for as she still owns the same, are invested.

A. She has a house up here on Elm street, I think it is;
419 the rest of it I do not know what disposition she made of it.

Q. Do you know, or can you set forth, any other matter or thing, which may be of benefit, or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer. Anything that you know about this case that hasn't been asked you?

A. To my personal knowledge, I do not know.

The plaintiff offers in evidence the copy heretofore made of the letter from D. G. Wallace to the witness.

Defendants by counsel object to the introduction of the letter as evidence because it is not competent.

Cross-examination.

By JOHN DAVID JONES:

Q. Mr. Householder, you say you are a brother-in-law of Mrs. Mettler and now Mrs. Smythe. State when you were married.

A. In 1894, the 24th of August.

Q. About what time in reference to the time of the disappearance of Wm. A. Hunter Jr. did you understand that the letters from Mrs. Mettler with reference to his disappearance, were received by the family here in Licking county?

A. Oh, I suspect 3 weeks; I don't know just exactly.

Q. They were received soon after his disappearance was claimed to have taken place, were they?

A. Yes sir, I think so.

Q. Now, the father of Mrs. Mettler is named Wm. A. Hunter or W. A. Hunter, is he.

A. Yes sir.

Q. Where were you living at the time those letters were received, and give your location from that time to the present time.

A. I lived in Jersey.

420 Q. At the time of the receipt of the letters?

A. Yes, sir.

Q. From that time Dec. 3, 1896, the time of William A. Hunter, Jr.'s disappearance, up to this time, state whether you or your wife, or to your knowledge, any other members of the family living in Licking Co., have had any communication from William A. Hunter, or knowledge as to his whereabouts.

A. No sir.

Q. Where have you lived since you lived at Utica?

A. I live at Utica now.

Q. I mean at Jersey.

A. I lived at Hanover 3 years. I lived at Utica 1 year.

Q. And that comprises all the places of your location?

A. I lived in Jersey 5 years; I don't know what year I received the letter; but I lived in Jersey 5 years and Hanover 3 years, Utica, 1.

Q. In what county are those places, and each of them is how far from Homer, the place of the family residence?

A. Jersey is about 15 miles; Hanover is about 26 miles; Utica is 4 miles; all in Licking county.

Q. Is the town of Homer also in Licking county?

A. It is.

Q. Speaking of the first communication on the subject of Wm. A. Hunter Jr.'s disappearance, which was called to your attention as having appeared in the Utica Herald and the Newark Daily Advocate, which were matters appearing previous to the communication of D. G. Wallace, did you see or know of those communications?

A. I saw the one in the Advocate; I never saw the one in the Utica Herald.

Q. How frequently have you or your wife visited or met the other members of the family who lived at Utica since the time of the disappearance of William A. Hunter, Jr.

421 A. Oh, 3 or 4 times a year.

Q. You have, I believe, stated that you have never heard from or met or seen Wm. A. Hunter Jr., since the time that he was reported as having disappeared?

A. No, sir, or before either.

Q. Oh, you never met him?

A. No, sir.

Q. And to your knowledge since that time no member of the family in Licking Co. has had any communication with him or ever met him?

A. No, sir, not to my knowledge.

F. P. HOUSEHOLDER.

I do further certify that the testimony so given by the said witness F. P. Householder, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said

witness, and was signed by the said witness in my presence, and in that of the counsel above mentioned; the genuine signature of said witness appearing above.

I do further certify that the copy of the letter from D. G. Wallace to F. P. Householder is a true copy of the original letter marked Wxhibit "A" and attached to the deposition of F. P. Householder in the case of Mettler *v.* The Fidelity Mutual Life Association.

Thereupon the plaintiff called as a witness LEWELLA MAY BUTCHER, who, having been by me carefully examined and duly sworn to testify the truth the whole truth and nothing but the truth in the said cause, was examined orally by counsel and gave answers and testimony as follows:

Testimony of the Witness Lewella May Butcher.

Direct examination.

Examined by Mr. LOCKE:

Q. State your name, age and place of residence.

422 A. My name is Lewella May Butcher; age 39; residence Homer Ohio.

Q. What, if any, family relationship exists between yourself and the lady whose name was formerly Jennie M. Mettler? and is now Jennie M. Smythe?

A. We are sisters.

Q. What family relationship, if any, exists between yourself and William A. Hunter Jr.

A. He is a brother.

Q. Do you remember the occurrence of the disappearance of William A. Hunter, Jr., from Texas, in Dec. 1896, and of Mrs. Mettler suing a life insurance company to recover insurance upon his life?

—. ——.

Q. Do you remember that occurrence?

A. Yes sir, I do.

Q. Please state whether before the time of Mr. Hunter's said disappearance it was his custom to maintain a family correspondence with yourself and other members of the family in Licking county?

A. Yes sir.

Q. Please state whether between December 3, 1896 the date of his disappearance, and April 27th 1903, the date of his arrest, you or within your knowledge, any other member of the family aside from Mrs. Mettler received any communication of any kind, verbal, written or telegraphic, from Mr. Hunter.

A. As to answering as to dates, I cannot tell you about that, but I did not receive any word, and no member of the family so far as I know received any communication.

Q. Please state whether in the suit of Mrs. Mettler against the insurance company you gave your deposition and testified substan-

tially that it was the general reputation in the family that William A. Hunter had been drowned in Dec. 1896?

Q. Yes, sir.

Q. Please state on what information and on what facts that reputation was based. And from whom the information was received. How did that reputation come to exist; what information did you have and from whom did you get it?

423

A. From the letter that we got from my sister.

Q. What sister was that?

A. Mrs. Mettler, that was the first information that we got?

Q. Where was she at that time.

A. At Pecos, Texas.

Q. Did you read the letters received from her?

A. I did.

Q. Have you them now in your possession?

A. No, sir.

Q. Do you know where they are or what has become of them?

A. I do not.

Q. Please state as well as you can from memory what those letters contained.

Defendants' counsel object to the oral proof of the letters, the letters not being produced.

A. She spoke of his disappearance and his absence for a certain length of time.

Q. Did she describe his camp on the river bank, as it had been found?

A. Yes, she did in certain letters after they found it.

Q. Did she tell what was the ostensible purpose of his trip when he left Pecos? Or what he said he was going away for?

A. Yes, I think she did.

Q. Do you remember what she said he left Pecos for.

A. I can't remember exactly.

Q. In substance.

A. Something about some land he had taken up there.

A. A good many of these things that I remember, have been talked over so much in the family that I don't know whether they were written or whether they were told to me.

Q. About how long was it after Mr. Hunter's disappearance before you first received a letter from Mrs. Mettler, about his supposed death?

424

A. I don't know.

Q. What other reason, if any, than the letters from Mrs. Mettler did the family have for believing that Mr. Hunter was dead?

A. His breaking off the correspondence with them.

Q. Please state whether at any time since April 27 1903, you have seen William A. Hunter, Jr.

A. I have not.

Q. Please state whether at any time since April 27th / 1903, you

have seen or talked with any one who claimed to come as a messenger from William A. Hunter, Jr.

A. I have not.

Q. Has any other member of the family so far as you know seen or talked with any such person?

Objected to as being hearsay and because it is immaterial.

A. No, sir.

Q. Where have you been living since April 27, 1903?

A. We moved on our old home place since 1903.

Q. When did you first suspect that your brother William A. Hunter was still living after his disappearance?

Objected to.

A. I did not believe that he was living until it was proven.

Q. My question was, when you first suspected it, not when you first believed it.

A. I don't know.

Q. Did you have such a suspicion at any time before his arrest?

Objected to by counsel for defendant because it is immaterial not belief, but simply a suspicion that he was still living.

A. Not until along towards the last did I think of such a thing.

Q. About when was it that you first thought of it? About how long before his arrest?

Objected to, because it assumes that she had a suspicion before his arrest.

425 A I didn't suspicion it, but a doubt sometimes from what people would say, would sometimes, a little bit, come into my mind, but I did not suspicion it, really.

Q. What was it that first caused these doubts to come into your mind? What fact or statement?

A. Newspaper reports.

Q. Reports in what newspapers?

A. The first was in the Mt. Vernon Banner, copied from the Newark Advocate, I think.

Q. What did that paper say that caused you to have doubts?

A. I don't remember.

Q. When did Mrs. Mettler return to Licking county from Texas for the first time after Mr. Hunter's disappearance?

A. I don't know.

Q. About when?

A. I don't know.

Q. Do you remember about what year?

A. I am so poor on dates, that I don't remember.

Q. Where was she living at the time her suit against the insurance company was tried?

A. In Texas.

Q. What conversation, if any, did you ever have with Mrs. Mettler before April 27, 1903, in regard to the question whether Mr. Hunter was dead or alive, that is, what conversation did you have before his arrest?

A. I don't remember.

Q. Do you remember whether you ever had any such conversation.

A. We have talked of it.

Q. What did she say to you on the subject?

A. I don't remember.

Q. Please state whether, at any time before April 27th, 1903, Mrs. Mettler ever spoke to you about dividing Mr. Hunter's estate
426 and giving you your share of it. Not the insurance money, but the property that he left when he disappeared.

A. Not that I remember of.

Q. Please state whether she ever told you that he left any property when he disappeared.

A. She did not.

Q. Please state whether she ever told you that when he disappeared he left in her possession a note which he held and which she collected.

A. She never did.

Q. Please state whether she ever told you that, together with the insurance policies in her favor, about $1500 of county script was found and taken into possession by her.

Objected to by defendants on the ground that it is irrelevant.

A. No, sir.

Q. Mrs. Mettler received as her part of the insurance money something over $11,000? Do you know what she has done with it, or any part of it, or in what form so much of it as she still owns is invested? If so, what disposition has been made of it.

A. I don't know.

Q. How close was the intimacy between yourself and Mrs. Mettler up in April 27th 1903, and after her return from Texas? How closely were you associated?

A. How much we were together, do you mean?

Q. Yes.

A. Not very much.

Q. How far was she living from you?

A. About 4 miles.

Q. Did she ever tell you what she had done with her insurance money or any portion of it?

A. She did not.

Q. What if anything, has Mrs. Smythe, formerly Mrs. Mettler ever said to you since Mr. Hunter's arrest, in regard to him or his supposed death?

427 A. I don't remember.

Q. Please state whether Mr. Housholder communicated to

you and to the other members of the family at Homer, the fact that he had received from one D. G. Wallace of Nashville, Tenn., a letter stating that he, Wallace had seen your brother, William A. Hunter, in Nashville, on the 22nd of Jan. 1897.

A. Yes sir.

Q. Did you see the letter?

A. Yes sir.

Q. Please state whether you, or any other member of the family in your knowledge, communicated to Mrs. Mettler the fact that Mr. Housholder had received such a letter from Mr. Wallace.

A. I don't remember.

Q. Do you remember whether the letter from Mr. Wallace was sent to Mrs. Mettler.

A. No, sir.

Q. Please state whether you or within your knowledge any other member of the family, after receiving the letter from Mr. Wallace, wrote to your brother William A. Hunter, at Nashville, Tenn.

A. Not to my knowledge.

Q. Please state what if any, steps ever were taken by you, or within your knowledge, by any member of the family in Licking county to ascertain whether it was true that your brother was alive and in Nashville Tenn., in Jan. 1897.

A. None that I know of.

Q. Please state what, if any, steps were taken by Mrs. Mettler within your knowledge, to ascertain whether it was true that her brother William, was alive and in Nashville, Tenn., in Jan. 1897.

A. I don't know anything about that.

Q. About how long was it after your brother's disappearance that you and the other members of the family first learned that his life was largely insured in favor of Mrs. Mettler?

428 A. I don't know how long.

Q. Was it soon after or a good while?

A. Not very long.

Q. To refresh your memory, I will ask you whether you remember that in January 1897, about six weeks after your brother's disappearance one Ab Landis came from Philadelphia and told the family about the insurance and obtained from the family a description of your brother?

A. I remember about the circumstance—I remember of hearing about the circumstance.

Q. Please state whether that was the first information the family received regarding the insurance, or *wthere* Mrs. Mettler had written the family about it before.

A. I think that was the first.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause. If yea, set forth the same, fully and at large in this answer.

That simply means, do you know anything else about this case that has not been asked you?

A. I do not.

Cross-examination.

By J. D. JONES:

Q. How long before the disappearance of your brother William A. Hunter that you had seen him last, or when did you see him last?

Q. In 1888 I think it was.

Q. In 1888.

A. Yes, sir.

Q. You have never seen him since 1888.

A. No, sir.

Q. When it was said that he was arrested, in Alabama, I believe, do you know who was arrested there?

A. No, sir.

429 Q. Have you no information except what was in the newspapers as to William A. Hunter being arrested at all, have you?

A. No, sir.

Q. When you say in your deposition that you never believed at all that he was alive until it was proven, what do you mean by that? Do you mean that when he had a trial or when somebody was tried as William A. Hunter in Texas, that the verdict of the jury was that he was guilty? Do you mean that time?

A. Yes, sir.

Q. Do you know anything about where that man is now?

A. No sir?

Q. Do you know whether he is in the penitentiary in Texas now or not?

A. No, sir, I don't.

Q. Now, Mrs. But-her, did your sister Mrs. Mettler or Mrs. Smythe, as she now is, ever since the disappearance of your brother and before the arrest of the person claimed to be William A. Hunter in Alabama,—did she ever, between those two dates say or intimate to you in the slightest degree that she had any doubt as to your brother's death?

A. No, sir.

Redirect examination.

By Mr. LOCKE:

Q. Has she ever since his arrest, said or intimated to you that she had any doubts as to his death?

A. I think not.

Q. Have you ever talked with her on that subject since his

arrest? *A.* The subject of whether he was dead or not? At any time after his arrest?

A. No, sir, she didn't.

LUELLA M. BUTCHER.

I do further certify that the testimony so given by the said witness, Lowella May Butcher, was reduced to typewriting by
430 me as the same appears at large above, and afterwards was read over to said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of said witness appearing above.

Thereupon, the plaintiff called as a witness, WILLIAM A. HUNTER, SR. who, having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined orally by counsel and gave answers and testimony as follows:

Testimony of the Witness William A. Hunter, Sr.

Direct examination.

Examined by Mr. LOCKE:

Q. State your name, age and place of residence.

A. My name is William A. Hunter, I write my name W. A. Hunter; age 75; place of residence, Utica, Ohio.

Q. What is your middle name?

A. Addison.

Q. What, if any, family relationship do you sustain to Mrs. Jennie M. Smythe and to William A. Hunter Jr.

A. They are my children.

Q. Is their mother living or dead?

A. She is dead.

Q. When did she die.

A. 16 years ago this month, I believe.

Q. When did you last see William A. Hunter, Jr.

A. It was at the death of my wife.

Q. About how tall a man was your son, William?

A. He was, I should think, about six feet.

Q. Was he a man of spare, medium or stout build?

A. Medium, I should say.

431 Q. I show you three pictures marked respectively Exhibit E and Exhibit A, Exhibit E–1 and Exhibit 8, found on the three leaves next following page 118 of the printed record in the United States Supreme Court of the case of The Fidelity Mutual Life Association of Philadelphia *vs.* Jennie M. Mettler, being cause No. 17,913 on the docket of that court. Please state whether these pictures or any of them, are true likenesses of your son, William.

(Hands picture to the witness.)

A. I would think that that one marked Exhibit E and Exhibit A, and the one marked Exhibit E-1—that (Exhibit E-1) looks the most like my boy that he did when I saw him last.

Q. Are the two pictures shown on the sheet marked Exhibit E and Exhibit A correct likenesses?

A. I should thin- that one (Exhibit E) is a correct likeness.

Q. Now, what about the other?

A. But if that one (E-1) wasn't here, just to pick up the book I wouldn't recognize either one of them to be my boy. That is, either one of the other pictures.

Q. Please state whether in the suit of Mrs. Mettler against the Fidelity Mutual Life Association you gave your deposition.

A. Yes, sir.

Q. And whether you testified in substance that it was the general reputation in your family that William A. Hunter, Jr. had been drowned in December, 1896.

A. Yes, sir.

Q. On what information and what facts was that reputation based?

A. We supposed him to be dead from a letter that my daughter, Jennie, wrote home.

Q. Where was she living at that time?

A. She was living at Pecos, Texas, at that time.

Q. About how long was it after his disappearance that Mrs. Mettler wrote you this letter?

A. Well, I don't know.

432 Q. A long time or a short time?

A. It was sometime afterwards; some little time.

Q. Have you that letter in your possession now?

A. No,, sir.

Q. Please state whether before the disappearance of your son William, it was his habit to correspond regularly with you and the other members of the family at home.

A. Yes, sir.

Q. About how frequently did he write home?

A. Well, I don't remember that.

Q. Frequently or infrequently?

A. To some one of the family; he didn't always write to me; some member of the family got a letter from him occasionally.

Q. About how many times a year would some one in the family usually hear from him?

A. I couldn't tell you, 3 or 4 times or more, likely.

Q. Please state whether, at any time after his disappearance, in December, 1896, and before his arrest in April 1903, any letter from William A. Hunter was received by you, or within your knowledge by any other member of the family at home.

A. No, sir.

Q. What effect, if any, did the cessation of your son's letters to

the family at home have upon the belief of yourself and other members of the family as to whether he was dead?

A. Why, we supposed him to be dead, for he was always a boy that wrote home, especially to his father.

Q. About when was it that Mrs. Mettler returned from Texas to Licking county to live?

A. Well, that I couldn't tell you, but it must have been—I would say from a year to 2 years afterwards; I don't know; maybe more; well it was that long anyhow.

Q. Do you mean 2 years after Mr. Hunter's disappearance?

A. Yes sir, about that.

433 Q. Please state what, if anything Mrs. Mettler ever said to you or wrote to you, between the time of William's disappearance, and the time of his arrest in regard to the property that he left when he disappeared, and in regard to a division of it, and giving you your half of it.

A. She never said anything about that; that was never mentioned.

Q. Please state what, if anything, Mrs. Mettler ever at any time said to you about having found and taken possession of some $1,000 of county script belonging to her brother William.

A. She never said anything, I never knew anything about that, no sir, nothing of that kind.

Q. Please state what, if anything, Mrs. Mettler ever said to you about her brother, William, having left with her when he disappeared a note which belonged to him and which she afterward collected.

A. I never heard of any. She never told me anything about a note.

Q. What, if anything, did Mrs. Mettler ever say to you before the time of the arrest of William A. Hunter in regard to the question as to whether he was dead or alive?

A. There didn't ever seem to be any question with her but what he was dead; she said he was dead.

Q. What, if anything, has she said to you on that subject since the arrest of William A. Hunter?

A. Well, may be I don't just understand you, make it a little plainer.

Q. I mean, what has she said to you since her brother's arrest about the question of whether he was dead or was still alive.

A. She told me that she didn't believe that it was Will that was arrested.

Q. Mrs. Mettler received as her share of the insurance money something over $11,000. Do you know what disposition she made of it, if so, what?

A. No, sir.

Q. Did she ever tell you how she invested it?

434 A. No, sir.

Q. Do you know how much of it she has now, and in what form it exists?

A. No sir. I know that she claims to own a lot up here in this town and that is all I know about it.

Q. With whom did Mrs. Mettler live from the time of her return to Ohio until the time of her marriage to Mr. Smythe?

A. She lived with me. At my house.

Q. And during that time she never consulted you about the investment of her money or told you what she was doing with it?

A. No, sir.

Q. Please state whether Mr. Housholder communicated to you in February, 1897, the fact that he had received a letter from one D. G. Wallace in which Mr. Wallace claimed to have seen and talked with your son, William, in Nashville, Tenn., on the 22nd of Jan. 1897.

A. Yes sir.

Q. Did you ever read the letter?

A. I heard him read the letter.

Q. Please state whether you, or within your knowledge, any other member of the family, after Mr. Housholder received this letter from Mr. Wallace, wrote to W. A. Hunter, at Nashville, Tenn.

A. No, sir.

Q. Please state what, if any, steps were taken by you or within your knowledge, by any member of the family in Licking county, to ascertain whether it was true that your son, William, was alive and in Nashville in January 1897, What steps did you or any other member of the family take to find out whether that was true.

A. Do you want to know if there was any communication or any effort made to any person in Tenn.——

Q. What you or any other member of the family did to find whether that was true.

A. As soon as I received this paper from the Tribune or the Advocate, I think it is, I sat down and wrote a letter to D. G.
435 Wallace and asked him in regard to this young man, to give his height and color of his hair and where he had met him, and all the circumstances; I told him to give me all the circumstances so I would know whether that was my son; I was anxious to know whether or no it was him, that he did meet; I never received any letter from him; Mr. Housholder wrote, but he got a letter.

Q. The writing of these two letters to Mr. Wallace by yourself and Mr. Housholder was, then I understand you to say, the only step taken within your knowledge by any member of the family in Ohio, to ascertain whether it was true that your son was alive in Nashville in Jan. 1897. Whether the writing of those letters was the only thing done, so far as you know.

A. Yes, sir.

Q. Please state whether you, or within your knowledge, any other member of the family in Ohio, in any way communicated to Mrs Mettler the fact that such a letter had been received by Mr. Housholder from Mr. Wallace.

A. Yes, sir.

Q. When, how and by whom was this fact communicated to Mrs. Mettler for the first time?

A. Well, I don't know, but it was communicated to her, because she asked for the paper and we sent her the paper.

Q. What further did you hear from Mrs. Mettler on that subject after you sent her the paper; if anything?

A. Well, it has been a good while ago, and I don't remember, I don't remember what did pass between the parties.

Q. Please state what, if any, steps Mrs. Mettler took, so far as you know, to ascertain whether it was true that her brother William was alive and in Nashville, in January, 1897.

A. I don't know, I don't know what steps.

Q. When did you first suspect, after the correspondence with Mr. Wallace, that your son William was still alive?

A. Not until—I didn't believe it when the word that he
436 was arrested came; not until the papers said he had a sentence; I didn't believe he was living; I didn't believe Mr. Wallace, you wouldn't believe him if you knew my boy as well as I did. He was a good boy.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of the-, or that may be material to the subject of this, your, examination or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

A. No, sir.

Cross-examination.

By J. D. JONES:

Q. Since the death of your wife, and the mother of William, you had not seen him, you state?

A. No, sir.

Q. You don't know who was arrested, that it was claimed was William, in Alabama?

A. No, sir.

Q. You don't know who was sentenced under the name of William in Texas?

A. No, sir.

Q. About how frequently did you get letters from Mrs. Mettler after William had disappeared, and before she returned from Texas?

A. Well, she frequently wrote to us, probably once a month she wrote.

Q. After she returned, and before her marriage to Mr. Smythe, she lived at your house, I understand?

A. Yes, sir.

Q. Where did she live after her marriage?

A. She lived, keeping-house in her property, on Elm street.

Q. In the city of Newark?

A. Yes, sir.

437 Q. About how long after her return from Texas was it that the Smythe marriage took place?

A. I don't know just when she did return, but they were married last fall or winter.

Q. A year ago last spring, wasn't it.

A. Yes, sir.

Q. You don't know how long she was at home until she was married?

A. A year or two, I think.

Q. Mr. Hunter, did Mrs. Mettler, or Mrs. Smythe, as she now is, ever, either in her letters before she returned from Texas, or in any conversation that you had with her, or that was had in your presence, after her return from Texas, ever say or write or intimate any doubt as to the death of your son, William?

A. No, sir she did not?

Q. Do you know where Mrs. Mettler deposited her money after she came back from Texas?

A. No, sir, I don't.

Redirect examination.

Examined by Mr. LOCKE:

Q. When and how did you first learn that your son William's life was heavily insured in favor of Mrs. Mettler?

A. I learned that through a man that was at my house that if I remember his name it was Landis. That was the first intimation that ever I had about it.

Q. Do you remember about when that was?

A. It was in the winter season of the year, but I couldn't tell you just the time, it was snowing the day that he was there, though I know.

Q. The same winter that William disappeared?

A. I think likely it was.

W. A. HUNTER.

I do further certify that the testimony so given by the said William A. Hunter Sr., was reduced to typewriting by me as the same appears at large above and afterwards was read over to said witness and was signed by the said witness in my presence and in
438 that of the counsel above named; the genuine signature of said witness appearing above.

By consent of counsel for the plaintiff, the witness WILLIAM A. HUNTER SR., was re-called by the defendant, and upon further cross-examination testified as follows:

Q. Mr. Hunter, did you receive any money from the Wilson bank on the checks of Jennie drawn in your favor?

A. I believe I did; it may be two checks.

Q. That is, the Wilson bank at Utica.
A. Yes, sir.
Q. That is the bank in which A. J. Wilson is the proprietor?
A. Yes, sir.
Q. Do you remember what the amounts of those checks were?
A. No, I don't but I think they were a little less than two hundred dollars.
Q. That is each one of them you mean.
A. Yes, sir.

In this connection, the plaintiff asks counsel for the defendant to produce the original checks drawn by Mrs. Mettler on Wilson's bank in pursuance of the request made this forenoon to do so.

Counsel for the defendant state, in answer to the present request, and also in answer to the request made this morning that they are unable to produce the original checks, because they are informed that the original checks were sent to the attorney of the defendant, Jennie M. Smythe, in this case in Texas, and are not now in her possession, but they wish to further state that they are also informed that the attorney says that he forwarded them to her by mail, as the attorneys now state without being sure of that fact, but she has not received them.

W. A. HUNTER.

By consent of counsel for plaintiff, Mr. Hunter is now permitted to sign this examination in recall without requiring the certificate of the examiner to be attached.

439 Thereupon, the plaintiff called as a witness Mrs. MINNIE H. HOUSHOLDER, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined orally by counsel and gave answers and testimony as follows:

Testimony of the Witness Minnie H. Housholder.

Direct examination.

Examined by Mr. LOCKE:

Q. State your name, age, and place of residence.
A. My name is Minnie H. Housholder, age 33, residence Utica, O.
Q. What is your husband's name.
A. Frank P. Housholder.
Q. What, if any, family relationship do you sustain to Mrs. Jennie Smythe and to William A. Hunter, Jr.
A. Brother and sister of mine.
Q. Please state whether you are familiar with the handwriting of your sister, Mrs. Jennie M. Smythe, formerly Jennie M. Mettler?
A. I am.

Q. I hand you a letter dated Pecos, Texas, Jan. 2, 1897, addressed to the Fidelity Mutual Life Association of Philadelphia at Philadelphia, Pennsylvania, signed Jennie M. Mettler, the body of which reads as follows: "Kindly send me such blanks as may be required by your association in order that I may have same properly filled to establish proof of my brother's death and to collect on policies, D 73372, D 73373, and D 73374." Please examine that letter and state whether in your opinion it is in the handwriting of your sister, Mrs. Smythe. (Hands letter to the witness.)

A. Well, I couldn't say.

Q. What is your opinion about it?

A. I am not sure that it is, I don't know what else I can say?

Q. I still ask you what do you think. You are not expected in such an examination to state positively, but to state what you think.

A. Well, I wouldn't say that it was.

440 Q. Please state whether you remember the circumstances of your husband's receiving from D. G. Wallace of Nashville, Tennessee, a letter stating in substance that Mr. Wallace had seen your brother William in Nashville on the 22nd of January 1897.

A. He received a letter from Wallace stating that he had seen my brother in Nashville, Tenn.

Q. Please state if you know whether that letter was ever sent to Mrs. Mettler?

A. I do not know.

Q. Please state, if you know, whether any member of the family including Mrs. Mettler, ever took any steps after this letter was received from Mr. Wallace to ascertain whether it was a fact that your brother William was living and in Nashville in January 1897. And if within your knowledge any such steps were taken state what they were and by whom they were taken and when they were taken.

A. There were no steps to my knowledge.

Q. About when was it that Mrs. Mettler returned from Texas to Ohio to live with reference to the disappearance of your brother, William?

A. About a year or two after.

Q. Please state what if anything Mrs. Mettler said to you or wrote to you at any time between the date of your brother's disappearance and the date of his arrest, concerning the question whether he was alive or dead.

A. I don't remember that she wrote to me.

Q. Or said anything to you. The question calls for both—conversation and letters.

A. No sir, she didn't say anything to me.

Q. Please state what if anything she said or wrote on this subject to any other member of the family within your personal knowledge.

A. She wrote of his sudden disappearance to the family.

Q. When was that.

A. In 1896 or 1897; the latter part of 1896, I think.

441 Q. Have you that letter in your possession?

A. No, sir.

Q. Please state as nearly as you can remember, then the contents of that letter.

Counsel for defendant- objects to the question, because the letter is not produced.

A. I couldn't repeat the contents of the letter.

Q. Can you state in substance what the letter said?

A. Nothing only it spoke of his disappearance and being unable to find him.

Q. Did it describe his camp as the same was found on the bank of the Pecos river?

A. Letters after that did.

Q. When were those letters received, about?

A. Oh, I should think 2 or three months, or maybe not more than 2 months afterwards.

Q. After the disappearance?

A. Yes, sir.

Q. Did they state on what ostensible errand William had left Pecos at the time of his disappearance?

A. He had gone to attend to some business at Mentone where he had property.

Q. Please state about how often, if at all, it was the custom of your brother William to write to members of the family at home during the time that elapsed between his going to Texas and his disappearance.

A. Every two to 4 weeks.

Q. Please state whether you, or, so far as you know, any other member of the family in Ohio, received, directly or indirectly any communication, oral, written or telegraphic, from your brother, William, at any time after his disappearance, in Dec., 1896, and before his arrest in April 1903, if so, state when, how and by whom such communication was received.

442 A. I never had any communication with him between those dates.

Q. Did any other member of the family aside from Mrs. Mettler receive any communication from him between those dates so far as you know?

A. Not to my knowledge.

Q. Please state whether in Mrs. Mettler's suit against the insurance company to recover insurance upon the life of her brother William, you gave a deposition and testified in substance that it was the general reputation in the family that your brother William was drowned in the Pecos river in December 1896.

A. Yes, sir.

Q. Upon what information, facts and circumstances was that opinion based?

A. From letters that we had received from sister that he was dead, was all.

Q. What effect, if any, did your brother's silence have upon the belief in the family?

A. We supposed he was dead.

Q. From his silence?

A. Yes sir.

Q. I understood you then to say that the sole basis of the family belief that your brother was dead was, first; the information received by the family at home from Mrs. Mettler, and second; the cessation of your brother's correspondence with the home folks. Is that correct?

A. It is.

Q. Please state if you know what disposition Mrs. Mettler made of the $11,000 or more that she received as her part of the proceeds of the insurance policies upon her brother's life.

A. I know nothing of it.

Q. Please state what, if anything Mrs. Mettler ever at any time before the arrest of your brother William said to you in regard to the division of the property which he left when he disappeared, and in regard to giving you your share of that property.

443 A. She never said anything to me about it.

Q. What, if anything did Mrs. Mettler ever say to you about her having found $1500 of county script together with the insurance policies, and having taken possession of the same, and about her having collected a note belonging to William which he left with her when he started for Mentone.

A. She never told me anything about any property which she received from him.

Q. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause. If yea, set forth the same, fully and at large in your answer.

A. I do not.

Cross-examination.

Examined by J. D. JONES:

Q. On the matter of the basis of the belief of the Hunter family, after the disappearance of your brother William, that he was dead, I wish to ask you to state whether you or the family had any relatives other than Jennie in Texas, who would know about the disappearance of your brother at all.

A. No, sir.

Q. Or any friends who would be interested in acquainting you with the fact except her.

A. No one.

Q. About how long after the disappearance of your brother in December 1896 was it before your sister, Jennie, Mrs. Mettler, returned to Ohio, in Licking county?

A. A year or so.

Q. Did you receive any letters from her after the disappearance of your brother, and before her return to Ohio, or did you see any from her during that period?

A. I saw letters.

444 Q. After she returned to Ohio, did you meet her and have conversations with her?

A. Yes, sir.

Q. Now, did she in any of those letters, or in any conversation with you or has she ever up to this time, written or said or intimated any doubt as to the death of your brother William?

A. She has not?

Redirect examination.

By Mr. LOCKE:

Q. Have you had any conversation with her since your brother's arrest in regard to the question of whether he was still living?

A. No sir.

Q. Did she ever tell you what, if any, steps, she had taken or do you of your own knowledge know what steps she took after your brother's arrest to ascertain whether the man arrested was really your brother William?

A. I don't know.

Q. Did she ever tell you?

A. She did not.

Q. Did she tell you of the visit of your brother William's attorney R. N. Bell, of Birmingham, Alabama, made to her in August 1903, and of the exhibition to her of photographs taken of your brother William, while he was in jail in Birmingham, and of your brother's request to her that she assist him in defraying the expense of his defense against the charge of swindling, which had been preferred against him by the grand jury of Dallas county, Texas?

A. She never has.

Recross-examination.

By J. D. JONES:

Q. And your sister, Jennie, did not, either tell you of the proceedings of this present plaintiff against her in the State of Texas, and in this State, to recover back the money that was paid to her by this plaintiff, upon the policies of insurance upon an issue in a lawsuit involving the question of her brother's death, did she?

445 A. No, sir she did not.

Q. Nor did she tell you, either of threats of this present plaintiff to prosecute her on a similar charge preferred against her brother if she should return to either the States of Alabama or Texas?

A. She did not.

Redirect examination.

By Mr. LOCKE:

Q. Have you any knowledge of such threats ever having been made by the plaintiff?
A. I have not.

Recross-examination.

By J. D. JONES:

Q. Have you either, any personal knowledge of the presence in Licking county of any attorney by the name of R. N. Bell representing your brother, or of his being present in Licking county soliciting your sister to advance money to defray the expense of his defense?
A. Not to my knowledge, I haven't.

MINNIE H. HOUSHOLDER.

I do further certify that the testimony so given by the said witness Minnie H. Housholder was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of all of the counsel above named. The genuine signature of said witness appearing above.

Here an adjournment was taken to 9 o'clock a. m. Sep. 14, tomorrow morning.

9 o'clock a. m. Sep. 14 1904, met pursuant to adjournment, same counsel present.

Thereupon, the plaintiff called as a witness D. G. WALLACE. Who, having been by me carefully examined and duly sworn to
446 testify the truth, the whole truth and nothing but the truth in the said cause, was examined by counsel, orally and gave answers and testimony as follows:

Testimony of the Witness D. G. Wallace.

Direct examination.

Examined by Mr. LOCKE:

Q. Please state your name, age and place of residence?
A. My name is D. G. Wallace; age 62; present place of residence Newark, Third street.
Q. When and for how long a time did you first reside in Newark?
A. Well, about 43 or 44 years.
Q. Up to what time?
A. Up to the year 1891 I left here.
Q. Where did you next reside after leaving Newark in 1891?

A. I resided in Nashville, Tenn.
Q. How long did you remain there?
A. About 11 or 12 years I remained there.
Q. When did you return to Newark?
A. I returned here the last of August a year ago, or the first September, or close to that.
Q. In what business were you engaged in Newark for the 10 or 15 years next preceding your removal to Nashville?
A. I was in the dry goods business part of the time here and other business; I was with the Advocate Printing Co. for 4 or 5 years.
Q. In what capacity were you connected with the Advocate Printing Co.
A. I collected for them and solicited for them.
Q. In what territory did you collect and solicit for the Advocate Printing Co.?
A. I solicited in this county and part of Knox and Perry; I wasn't collecting for them then; I was soliciting for the book bindery business.
Q. Please state whether during the time that you lived in Newark, before your removal to Nashville, you were acquainted with any members of the family of William A. Hunter of Homer Ohio?
447 A. No, sir, I was not.
Q. Please state whether you knew that family by reputation?
A. I knew them by reputation, yes, sir.
Q. In what business were you engaged in 1896 and 1897 at Nashville?
A. In the book business for P. F. Collier, New York, selling books.
Q. Please state whether, while you lived in Nashville, in 1896 and 1897 you were a subscribed to the Newark Advocate?
A. Yes, sir, I was: I wasn't what you might call a subscriber; they sent the paper to me all the same.
Q. Please state whether you saw in the Newark Advocate an item published on or about January 8, 1897, in which it was stated in substance that William A. Hunter, the son of William A. Hunter, of Homer, Ohio, was supposed to have been drowned in Texas?
A. Yes, sir.
Q. Please state whether at any time in Nashville you saw and talked with the William A. Hunter referred to in that item?
A. Yes, sir, I saw the man.
Q. Please state when and where you saw him?
A. I saw him on the corner of Church and Summer, in a cigar store.
Q. Whose cigar store was that?
A. Mr. Floersh.
Q. When was it that you saw him?
A. The 22nd of January.

Q. What year?
A. 1897.
Q. What conversation, if any, did you have with him?
A. Well, I went into the cigar store that morning, it was raining very hard; I had my books with me, to get a little tobacco in there; and I saw a gentleman in the store—a nice looking man, he seemed to be a stranger to me; and we got to talking; I asked the gentleman where he was from and he told me he was from Texas; he said he was down here in Nashville looking for a place to go into the real estate business; he asked if there were many real
448 estate offices in Nashville and I told him there was; and still room for more; finally he asked me where I was from; I told him Newark Ohio; he said; What is your name? I says: D. G. Wallace says I; what is your name? He says My name is Wm. A. Hunter of Homer, Ohio; I shook hands with him and said I was glad to see a man from Licking Co., and I stepped over to the case and bought a couple of cigars and gave him a cigar and we sat down there and had a smoke and after we got through he asked me if I wouldn't go down sometime to see him at his boarding-house; I told him I would probably if I had time; that was all the conversation that we had particularly and I went out and went home to my sister-in-law's.
Q. Where did you say Floersh's cigar store was located?
A. At the corner of Church and Summer streets.
Q. In Nashville?
A. Yes, sir.
Q. About how tall a man was this Wm. A. Hunter that you saw?
A. He was over six foot tall, I thought, from the looks of him when I saw him standing there, a tall, slender fellow.
Q. Was he spare, medium or stout build?
A. Oh, he was kind of a stout man; he didn't look like he was a very fleshy man; he wasn't as fleshy a man as Mr. Locke; I don't know how much he would weigh.
Q. What color of clothing did he have on?
A. He had a black suit on.
Q. If you remember, please state what colored overcoat he had on.
A. He had a black overcoat on him.
Q. What kind of hat?
A. I wouldn't be positive whether it was a soft hat or a derby; a black hat derby or soft hat; I couldn't say which it was.
Q. What sort of beard, if any, did he wear?
A. He had a moustache.
Q. Please state what, if any, conversation you had with Mr. Hunter in regard to the Hunter family of Licking county.
449 A. All he said to me was that his folks traded with Wallace's in the dry goods business on the south side of the square.
Q. Please state, if you remember, what was the color of Mr. Hunter's

moustache, and whether he was of light or dark complexion or medium.

A. He was kind of a light complected man. His moustache was black.

Q. After seeing the item in the Newark Advocate announcing the supposed death of William A. Hunter, what did you do?

A. I wrote the notice to the Newark Advocate—the Advocate Printing Company that I met one William A. Hunter, corner of Church and Summer in a cigar store.

Q. Did the Newark Advocate print your letter or an item made up from your letter?

A. Yes, sir.

Q. Please state whether after the publication of the item in the Newark Advocate to the effect that you had seen William A. Hunter in Nashville, on the 22nd of January you received any communication from any member of the family in Licking county.

A. Yes, sir, I received a letter from Mr. Householder.

Q. Is that letter now in your possession?

A. No, sir.

Q. What became of it? Do you know?

A. I couldn't tell you.

Q. What was your custom at that time in reference to preserving your correspondence?

A. I never preserved my correspondence; I just threw them into the waste basket.

Q. Please state as well as you can from memory the contents of Mr. Housholder's letter to you.

A. Mr. Housholder wrote me a letter and wanted me to describe the man; his height and all; and I did so.

Q. Please state whether you made any reply to Mr. Householder.

450 A. Yes sir, I made a reply to his letter.

Q. Giving him the information he requested?

A. Yes, sir.

Q. Please state whether you ever received a second letter from Mr. Housholder.

A. No, sir.

Q. Please state what, if any, communication relative to Wm. A. Hunter, aside from the letter you received from Mr. Housholder, was ever received by you from any member of the Hunter family?

A. None.

Q. Please state what, if any communication, you ever received in reference to William A. Hunter, from Mrs. Jennie M. Mettler, or from any one who claimed to be inquiring in her behalf.

A. None.

Q. Why did you write to the Advocate announcing the fact that you had seen Hunter in Nashville?

Objected to by counsel for defendants, as being immaterial.

A. Just to let his friends know that the man was living.

Q. Please state whether you ever saw William Hunter again after your first interview with him in Floersh's cigar store.

A. I never met him after that, no, sir.

Q. Please state what, if any steps were taken so far as you know, by or in behalf of Mrs. Mettler or any member of William A. Hunter's family to ascertain whether it was a fact that William A. Hunter was alive and seen by you in Nashville in January 1897.

A. No, I didn't know anything about that. Nobody said anything to me about it.

Q. Do you know, or can you set forth, any other matter or thing that may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause. If yea, set forth the same fully and at large in your answer.

A. No, sir.

451 Cross-examination.

By J. D. JONES:

Q. You have stated, I believe that you had no previous knowledge or acquaintance with this man that you met in Nashville in a cigar store?

A. No, sir; none.

Q. I think you stated to the special examiner, but which he didn't get down, as I understand, that this man in the cigar store had on an overcoat which interfered with you- ability to tell just what kind of a physique he had or whether he was very stout or not?

A. Yes, sir. I couldn't tell the weight of the man; he had the overcoat on.

D. G. WALLACE.

I do further certify that the testimony so given by the said witness D. G. Wallace was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness in my presence and in that of the counsel above named; the genuine signature of said witness appearing above.

Thereupon, the plaintiff called as a witness HARRY P. KUTZ, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined orally by counsel and gave answers and testimony as follows:

Testimony of the Witness Harry P. Kutz.

Direct examination.

Examined by Mr. LOCKE:

Q. Please state your name, age and place of residence?
A. My name is Harry P. Kutz, age 37, residence 298 North Forth street, Newark Ohio.
Q. How long have you lived in Newark?
A. 17 years next October.
Q. What, if any, official position did you hold in Licking county in the month of April and in the month of May, 1903?
A. I was city tax assessor for precinct B of the fourth ward.
452 I wasn't elected, I was appointed assistant by the assessor of the ward.
Q. Please state what, if any, interview you had with Mrs. Jennie M. Smythe in April, 1903, relative to the rendition of her property for taxation?
A. On the 18th of April I left 3 blank duplicates at the house and on the 25th of April I took up the duplicate left for her; there was the father and his son and the Mrs. I put the questions to her the same as to all the rest of the tax payers; and she stated that she hadn't anything in any way excepting the property that she lived in; therefore there was nothing returned for taxation.
Q. Were you taking the rendition of both real and personal property?
A. Nothing but the personal.
Q. You were not concerned then in the rendition of the property she lived in?
A. No, sir.
Q. Did she fill out and sign the written return stating that she had no personal property?

Objected to on the ground that the question shows that the return was in writing; and that ought to be produced.

A. She signed the return, and I took it up and turned it in.
Q. Where is that written return now?
A. I turned it into the auditor's office.
Q. What was the custom in the assessor's office in Newark with regard to preserving returns made on the usual blanks by tax payers who stated in their returns that they had no property subject to taxation?

A. We made no record of those kind at all; just turned them into the auditor.

Q. What became of the original returns?

A. I couldn't tell. We turned in those that had a return in one package, and those that had no return in another.

Q. Was it or not the custom to preserve and file for future reference the returns made by those who showed no property sub-

453 ject to taxation?

A. I couldn't answer that question although the returns that we brought in that were black—the deputy, Bell, told me that they never kept them.

Q. Who is Bell?

A. The deputy auditor.

Q. Please state whether you have ever made any search or inquiry in the auditor's office for the original return made by Mrs. Mettler to you?

A. No, sir, I never did.

Q. What conversation, if any, did you have with Mrs. Mettler at that time in regard to the personal property, if any, that she had subject to taxation? My question is independent of what she may have written on the return; simply conversation.

A. The only conversation was, the question- that I put to her as they appeared on the blank, about the moneys, bonds and mortgages that she may have had in her possession.

Q. Did she make answer to you orally to the questions which you read to her?

A. Yes, sir.

Q. In her oral answers to the questions which you propounded to her, what, if anything, did she say she had in the way of personal property subject to taxation?

A. Nothing at all; all she had was what she had invested in that property.

Q. Please state whether at any time subsequent to your first interview with Mrs. Smythe on April 25th, you had a second interview with her relative to her taxable property.

A. Yes, sir. I had.

Q. When did you have that interview?

A. Either the first or second of May; I couldn't give the

454 exact date; it was Friday or Saturday.

Q. Of what year?

A. 1903, the same year.

Q. What did you say to her and what did she say to you on that occasion.

A. Well, I went up to the house and called for Mrs. Smythe and she answered the door and I told her that I came to get a second blank filled out; she wanted to know the reason why, because she said she had filled out one before; and I told her that it had been mentioned to me that she was supposed to have some money that she had received from the insurance company that belonged to me on my re-

port; but she answered that she had made a statement before and that she hadn't anything else to give in; that she had given everything in in the first place; I then went to work and was very particular in re-stating every one of those questions on the blank in regard to the moneys in her possession or in bank or bonds and mortgages, and she answered *by* questions very readily "No," and I read over the oath again and had her sign it the second time.

Defendants' counsel object to the answer as attempting to give the contents of a written instrument.

Q. You say you read to her——

Objected to as too persuasive.

Q. In what way did you ask Mrs. Smythe on the occasion of your second interview the questions which you propounded to her?
A. I just read the questions right off of the blank.
Q. In what way did she make answer?
A. She answered "No" to each one of them, that she didn't have any.
Q. Did she make these answers orally or in writing?
A. Orally.
Q. What did you do with the second return made by Mrs. Smythe?
A. It was returned in—turned in with the first.
Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause. If yea, set forth the same fully and at large in your answer.
455
A. No, sir, I don't

HARRY P. KUTZ.

I do further certify that the testimony so given by the said witness, Harry P. Kutz, was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence, and in that of such of the parties or counsel as were in attendance, the genuine signature of said witness appearing above.

Thereupon the plaintiff called as a witness CLARA B. HUNTER, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined by counsel orally and gave answers and testimony as follows:

Testimony of the Witness Clara B. Hunter.

Direct examination.

Examined by Mr. LOCKE:

Q. Please give your name, age and place of residence?
A. My name is Clara B. Hunter, age 36, place of residence Utica, Ohio.
Q. What if any, family relationship do you bear to Mrs. Jennie M. Smythe and William A. Hunter?
A. A sister.
Q. About how old is Mrs. Smythe?
A. About 45 or 46. I couldn't tell exactly, without I would stop and think.
Q. I would like to have it as near accurate as you can give it?
A. Well, I will say 46.
Q. About how old is your brother William?
A. I would say about 40 think that is right, as near as I know.
Q. Please state where Mrs. Smythe or Mrs. Mettler was liv-
456 ing in December 1896 and January 1897?
A. At Pecos, Texas.
Q. Please state whether you or any other member of the family in Licking county received from Mrs. Mettler about the last of Dec 1896 or the first of Jan. 1897, a letter relating to your brother William?
A. Some of us did; one of the family; I wouldn't say which one
Q. Did you read that letter?
A. Yes, sir.
Q. Have you it now in your possession, or do you know where it is?
A. I don't know where it is.
Q. Please state as nearly as you can from memory the contents o the letter. In a general way?
A. Well, it stated that he had disappeared. We got the under standing from the letter that he was drowned in the Pecos river.
Q. Did she state for what place and on what errand he had gon from Pecos?
A. He started to go to Loving county.
Q. On what errand did she say?
A. I don't know.
Q. Did she described the camp which had been found on th banks of the ricer?
A. Yes, sir.
Q. Please state whether it had been your brother William's cu

tom prior to that time to maintain a family correspondence with the home folks in Licking Co.?

A. Yes, sir.

Q. About how frequently did he write home?

A. At least once a month.

Q. Please state whether you or within your knowledge any other member of the family in Licking county except Mrs. Mettler received any communication of any kind from your brother William at any time between his disappearance in Dec. 1896, and his arrest in April 1903?

457 A. I never did, and not to my knowledge none of the rest of them.

Q. Please state whether in Mrs. Mettler's suit against the Fidelity Mutual Life Ass'n you testified by deposition in substance that the general reputation in your family was that your brother William had been drowned in the Pecos river in Dec. 1896.

A. Yes, sir.

Q. Please state on just what information, facts and circumstances that opinion was based—that reputation was based.

A. She wrote us a letter and sent us a paper from Texas with a clipping in it and I never doubted the truth of it.

Q. What effect, if any, did your brother William's ceasing to correspond with the home folks have upon their belief that he was dead?

A. That made me think he was dead.

Q. I understand you to say, then Miss Hunter, that the sole foundation of the family belief and reputation that your brother William had been drowned in the Pecos river was the information conveyed to you by Mrs. Mettler in her letters and in the newspaper which she sent you, and the fact that your brother suddenly ceased to correspond with the family at home, is that correct.

A. Yes, sir.

Q. Have you the newspaper which Mrs. Mettler sent you?

A. I think not.

Q. What was the general nature of the article in the newspaper?

A. It spoke of his disappearance. That was about all.

Q. Did it describe his camp and so on.

A. I don't think it did.

Q. Please state whether Mrs. Mettler told you what disposition had been made of the property left by your brother William when he disappeared and if she did what disposition did she say had been made?

A. She did not.

Q. What, if anything, did she say to you about having collected a note belonging to him, and about having taken possession of some $1500 of county script which she found together with the in-

458 surance policies and about having a distribution of his property and giving you your share of it?

A. I don't remember of her ever saying anything about it.

Q. About any of those matters?

A. No, sir.

Q. Please state whether she ever made any statement to you in regard to your brother William's financial affairs?

A. No, sir.

Q. When did you first learn and how that William's life was largely issued in favor of Mrs. Mettler?

A. I think it was by a letter from her.

Q. When was that letter received? About when? Was it in the first letter about his disappearance?

A. No, sir; and I don't know that it was in the second one; it was sometime afterwards; I think inside of a month.

Q. Do you remember the visit of one Ab Landis to your family?

A. Yes sir.

Q. When did that occur?

A. Before we got any letter from her at all.

Q. Do you mean before you got any letter from her about your brother's disappearance, or before you got any letter from her about the insurance?

A. About the insurance, I think.

Q. About how long after your brother's disappearance was it that Landis came to Homer to see the family.

A. A short time; I don't know how long.

Q. Was it before or after the correspondence which Mr. Housholder had with Mr. Wallace of Nashville?

A. I don't know I can tell what I think. I think it was before but I wouldn't swear to that.

Q. Did you see the letter received by Mr. Housholder from Mr. Wallace of Nashville, Tenn.?

459 A. I did.

Q. Please state whether you or within your knowledge any other member of the family, sent that letter to Mrs. Mettler or communicated to her in any way the fact that Mr. Wallace claimed to have seen your brother William in Nashville, Tenn. in January 1897.

A. I don't know.

Q. What steps, if any, were taken by yourself, or so far as you know by any other member of the family in Licking Co., to ascertain whether it was true that your brother William had been seen alive in Nashville in Jan. 1897.

A. Father wrote to Mr. Wallace.

Q. Anything else that you know of?

A. I don't know of anything else.

Q. What steps, if any, so far as you know, either of your own knowledge, or from statements made to you by Mrs. Mettler, did she take to ascertain whether it was true that her brother William was alive in Nashville in Jan. 1897?

A. I don't know of any.

Q. Please state what, if anything, Mrs. Mettler ever said to you at

any time before April 1903, in regard to the question whether your brother William was living or dead.

A. She always had the idea that he was dead; she always said she thought so.

Q. And you believed her?

A. Yes, sir.

Q. Mrs. Mettler received something over $11,000 as her share of the insurance money. Please state what disposition she made of that money, as far as you know.

A. I don't know what she did with it.

Q. How long were you and she living together in the same house as members of the same family after she received this money? She received it in June or July 1902.

A. It was a year or more; I don't know just how long it was.

460 Q. Please state whether you and Mrs. Mettler took an extended journey together soon after she received this money?

A. Yes sir.

Q. How long were you gone and what points did you visit?

A. We were gone just 2 months. We visited all the large cities between here and San Francisco and from San Francisco back to New Orleans.

Q. Which cities were these?

A. Cleveland—we started from Cleveland, Chicago; Denver, Pueblo; Colorado Springs; Salt Lake City; San Francisco; Los Angeles and several towns between Los Angeles and San Francisco in California.

Q. After leaving Los Angeles, what cities did you visit?

A. El Paso, Ft. Worth and Dallas, and then to Oklahoma.

Q. Did you visit your brother's family in Oklahoma?

A. Yes, sir.

Q. You went from Dallas north to Oklahoma.

A. Dallas or Ft. Worth, on the Rock Island road.

Q. From Oklahoma, how did you return home?

A. We came down to Ft. Worth and to New Orleans, up through Alabama, and Georgia and Kentucky and Tennessee.

Q. Through what towns in Alabama did you pass?

A. I don't remember only one; I wakened up and saw Birmingham and one of the buildings and I knew I was there.

Q. You didn't stop in Birmingham?

A. No, sir.

Q. You passed through in the night?

A. Yes, sir.

—. While in Dallas did you and Mrs. Mettler call on Mr. William H. Clark, her attorney?

A. We went to his office, I guess it was his office.

Q. Did Mrs. Mettler receive any papers from Mr. Clark on that occasion?

A. Not that I know of.

461 Q. Was your call simply a short, social call?
A. Yes, sir.
Q. Please state when you saw your brother William the last time.
A. In the summer of 1888.
Q. That was when he came home to his mother's funeral?
A. Yes, sir.
Q. Are you familiar with Mrs. Mettler's handwriting?
A. I should think I was.
Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination? Or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer? That is, do you know anything else about this case? If so, tell it. That is anything other that what I have asked you.
A. No, sir, I don't.
Q. What, if any, steps were taken by yourself or so far as you know by Mrs. Smythe, or by any other member of the family here in Licking county when the arrest of your brother at Birmingham Ala., was reported in April, 1903, to ascertain whether it was, in fact your brother William, who had been arrested there?
A. Yes, there was one.
Q. What was that?
A. My uncle wrote to a party there and asked him to go and find out, but he didn't find out, and that was the only steps that I know of; he couldn't find out.
Q. What uncle was it that wrote that letter?
A. Newton Chambers, father's half brother.
Q. To whom was the letter written?
A. I don't know the man's name.
Q. Did you say it was the sheriff?
A. No, sir, I didn't say it was.
462 Q. You don't know to whom the letter was written?
A. No, sir; I don't know who it was written to.
Q. So far the-, as you know, Mrs. Smythe took no steps to learn whether it was really your brother William who was under arrest in Birmingham?
A. No, sir, I don't know of any.
Q. Please state, if you know, when it was that Mrs. Mettler married James N. Smythe?
A. The last of March 1903.

Cross-examination.

By J. D. JONES:

Q. Miss Hunter, state whether in any letter received from Mrs. Mettler, now Mrs. Smythe, your sister, or any expression or demeanor of her while you associated with her since her return from

Texas, there was contained or made any expression that caused you to doubt in any way her belief that your brother William was dead.

A. No, never any.

Q. Was there any intimation ever made by her that she and your brother William had made any arrangements or had any understanding that he should disappear under such circumstances as to indicate that he was dead, and that she should prosecute the insurance company to obtain the money on the policies of insurance.

A. Never.

CLARA B. HUNTER.

I do further certify that the testimony so given by the said witness Clara B. Hunter was reduced to typewriting by me as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of counsel above named, the genuine signature of said witness appearing above.

Thereupon, the plaintiff called as a witness BIRDIE J.
463 YOAKUM, who having been by me carefully examined and duly sworn to testify the truth the whole truth and nothing but the truth in the said cause, was examined by counsel orally and gave answers and testimony as follows:

Testimony of the Witness Birdie J. Yoakum.

Examined by Mr. LOCKE:

Q. Please state your name, age, and place of residence.

A. My name is Birdie J. Yoakum, age 33; residence Homer, Ohio.

Q. What is your husband's name?

A. E. L. Yoakum.

Q. What, if any, family relationship do you sustain to William A. Hunter Jr. and Mrs. Jennie M. Smythe?

A. I am a sister.

Q. Please state whether in the suit of Mrs. Smyther, formerly Mrs. Mettler against the Fidelity Mutual Life Association you testified that the general reputation in your family was that your brother William A. Hunter had been drowned in the Pecos river?

A. Yes, sir.

Q. Please state upon what information, facts and circumstances that family reputation was based.

A. From a letter received from sister Jennie.

Q. Where was she at that time?

A. At Pecos.

Q. Texas.

A. Yes, sir.

Q. Have you that letter in your possession now?

A. I have not.

Q. Do you know where it is?

A. No, sir

Q. What did Mrs. Mettler say in that letter, as nearly as you can remember?

A. As far as I can remember she stated what they found there at the river; his camping outfit and how they supposed that he had been drowned.

464 Q. What had been your brother William's habit up to that time in regard to corresponding with the folks at home in Licking Co.?

A. He had kept up regular correspondence, as far as I can remember.

Q. Did that correspondence continue after his disappearance from Pecos?

A. No, sir.

Q. When did you first hear from him after he disappeared from Pecos, if at all.

A. Not at all.

Q. What effect, if any, did the fact that you ceased to hear from your brother William have upon the belief of yourself and the other member of the family that he was dead?

A. We had no doubt but that he was dead.

Q. Why. What had this to do with your belief—the fact that you didn't hear from him any more, if anything?

A. Well, we took it for granted?

Q. Please state what, if any, reason the family had for believing that your brother William was dead other than the information received by it from Mrs. Mettler and the fact that your brother ceased to write home?

A. We had no other.

Q. Please state what, if anything Mrs. Mettler said to you, or within your knowledge to other members of the family between the time of your brother's disappearance and the time of his arrest in regard to the question whether he was dead or alive?

A. I don't remember of anything.

Q. Please state what, if anything, Mrs. Mettler ever said to you about distributing your brother's property among his heirs and giving you your share?

A. She never said anything.

Q. Did Mrs. Mettler ever say anything to you, and if so what about collecting a note that belonged to your brother William and about taking possession of some $1500 of county script that belonged to him?

465 A. No, sir.

Q. Please state whether you or within your knowledge any other member of the family communicated to Mrs. Mettler the fact that Mr. Housholder had received from D. G. Wallace of Nashville, Tenn., a letter in which Mr. Wallace said that he had seen your brother William in Nashville in January 1897?

A. I did not.
Q. Do you know about the others?
A. No, I can't say about them.
Q. What, if any, steps were taken by yourself or within your knowledge by any other member of the family aside from Mrs. Mettler to ascertain whether it was true that your brother William was alive and in Nashville in January, 1897.
A. I don't know of any.
Q. Please state what, if any, steps were taken by Mrs. Mettler within your knowledge to ascertain whether it was true that your brother William was alive and in Nashville in January in 1897?
A. I don't know.
Q. Please state what, if any, steps were taken by yourself or any other member of your family Mrs. Smythe included when the arrest of your brother William at Birmingham, Alabama, was reported in April or May 1903, to ascertain whether, in fact, the man arrested was your brother William A. Hunter?
A. I think that is the time that uncle Newt Chambers took steps to ascertain whether it was him or not.
Q. What did he do?
A. He just wrote a letter.
Q. Do you know to whom he wrote?
A. No, sir.
Q. Do you know what reply he received, if any?
A. I remember a description, but it did't describe my brother very well.
466 Q. What else, if anything was done, so far as you know by any member of the family?
A. Nothing so far as I know.
Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.
A. No, sir.

BIRDIE J. YOAKUM.

(No cross examination.)

I do further certify that the testimony so given by the said witness, Birdie J. Yoakum, was reduced to typewriting by me as the same appears at large above and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of counsel above named; the genuine signature of said witness appearing above.

Thereupon, the plaintiff called as a witness ANDREW H. PIERSON, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined by counsel orally and gave answers and testimony as follows:

Testimony of the Witness Andrew J. Pierson.

Examined by Mr. LOCKE:

Q. Please state your name, age, and place of residence.
A. My name is A. H. Pierson, age 45, residence 27 North Fifth St., Newark, O.
Q. In what business are you engaged, Mr. Pierson?
A. In newspaper work.
Q. With what newspaper are you connected?
A. The Newark Advocate.
Q. In what capacity?
467 A. As business manager.
Q. Have you with you the file of the Newark Daily Advocate for the month of January 1897.
A. Yes, sir.
Q. Will you kindly turn to page 8 of the issue of January 8, 1897, and state whether you find there an article relating to the supposed death of one William A. Hunter.
A. Yes, sir.
Q. Will you kindly permit the file of your paper to be attached to your deposition as an exhibit and sent to the court at Dallas, Texas, or will you permit the article in question to be detached from the paper and used as an exhibit to your deposition.
A. Well, we never cut up any file; they are kept as records in our office; we keep the records.
Q. So, you decline to permit wither the file of the article in question to be removed from your custody?
A. Yes, sir.
Q. Please read to the examiner, so that he may transcribe *in* into your deposition the article in question.
A. "Horse starved to death." "And the owner, a former Licking County man, probably drowned in Texas." "Word has been received by Addison Hunter of Homer of the disappearance and probable death of his son, William, in Texas. The Utica Heral- says: "Will went to Texas some years ago, and recently has been sheriff of the county in which he lived. Some time ago he started to a far point, by team, on some official business. He stopped on the way at the house of his widowed sister Mrs. Mettler, and arranged to call on his return in a few days and take her with him to his own home.

"Two weeks passed, and as Mr. Hunter had not returned his sister became alarmed and notified friends, who sent a party in search of the missing man. After going quite a distance, the com-

pany discovered Hunter's wagon, containing his gun and other belongings, nearby, tied to a tree, lay the dead body of one horse, starved to death. The other animal was feeding at no great
468 distance. No trace of Hunter was found, and it is supposed that he went to the steep bank of the river and while trying to dip water with a bucket and rope fell in, and was swept away"

Defendant- object to said publication as evidence in this case because it is irrelevant and incompetent.

Q. Have you read said article correctly to the examiner to be transcribed in your deposition?

A. Yes, sir:

Q. When was that article published in the Advocate?

A. Jan. 8, 1897.

Q. Please turn to page 8 of the issue of the Newark Daily Advocate of Jan. 29, 1897 and state whether you find on that page an article relating to William A. Hunter.

A. Yes, sir.

Q. Will you permit that article or the paper containing it, to be removed from your files and attached as an exhibit to your deposition?

A. No, sir.

Q. Please read that article to the examiner that he may transcribe it into your deposition.

The reading of the article and transcribing it as evidence in this case is objected to by defendants for the reason that it is irrelevant.

A. "Hunter is alive." Mr. D. G. Wallace says he met him at Nashville, Tenn., ten days ago.

"On January 8, the Advocate published an article credited to a Utica paper, saying that word had been received by Addison Hunter, at Homer, this county, of the disappearance and probable death of his son, William in Texas. The notice said that after William Hunter had for two weeks been missing from the town in which he lived, his sister became alarmed, and notified friends who sent a party in search of him, Mr. Hunter recently elected sheriff, had left the Texas town on official business but his prolonged absence could not be accounted for.

"After going quite a distance" said the notice, "the company
469 discovered Hunter's wagon containing gun and other belongings nearby tied to a tree lay the dead body of one of his horses starved to death. The other animal was feeding at no great distance. No trace of Hunter was found and it was supposed that he had gone to the steep bank of the river and while trying to dip water with a bucket and rope fell in and was swept away." Mr. D. G. Wallace, formerly of this city, now living at Nashville, Tenn., read in the Advocate the above quotation from the Utica paper. Mr. Wallace says in a letter just received: "Mr. William Hunter referred to is not dead as I met him and shook hands with him on a

street car in Nashville on January 22. Mr. Hunter's father lives in Homer, Ohio."

Defendants' counsel move to strike the above cut for the reason that it is incompetent as testimony in this case.

Q. Have you read the article in question correctly to the examiner for transcription into your deposition?

A. Yes, sir.

Q. When was this article published in your paper?

A. Jan. 29, 1897.

Q. From what source was the article of Jan. 8, 1897 obtained?

A. I don't know that I am able to answer that, but I presume from the Utica Herald; at least part of it is quoted from the Utica Herald.

Q. Where is the Utica Herald published?

A. At Utica O.

Q. In Licking county?

A. Yes, sir, in Licking Co.

Q. About how far is Utica from Homer?

A. I am not sure but I think 4 or 5 miles and may be 6.

Q. Are you acquainted with the Mr. D. G. Wallace mentioned in the article of Jan. 29, 1897?

A. Yes sir.

Q. How long have you know- him?

A. Oh, for I expect 22 or 23 years.

Q. Please state whether he ever was in the employ of your company?

A. Yes, sir.

470 Q. When and in what capacity.

A. As solicitor and collector.

Q. About when?

A. I couldn't give just the dates but between 1890 and 1897, previous to his going to Tennessee.

Q. Please state whether during the time that Mr. Wallace lived in Nashville, Tenn., the Newark Advocate was regularly sent to him.

A. Yes, sir.

Q. Please state from what source the information contained in the article of Jan. 29, 1897 was obtained?

Defendants object to the question because it is immaterial and incompetent.

A. From a letter received from Mr. Wallace.

Q. Have you that letter now in your possession?

A. No, sir.

Q. What became of it?

A. I couldn't say.

Q. What was the custom of the office at that time in reference to the preservation of letters of that character?

A. Letters of any special importance were put on file, others were thrown in the waste basket.

Q. Was this letter filed?

A. I think not.

Q. Please state, if you remember whether a copy of the issue of January 29, 1897, containing the article in question was sent to Mr. William A. Hunter, Sr., of Homer, Ohio.

A. It might have been; but I couldn't say for certain about that.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I don't think I do.

471 The plaintiff now offers in evidence the two copies of articles published in the Newark Daily Advocate and contained in the testimony of the witness A. H. Pierson.

To which offer the defendants, by counsel, object for the reason that they are incompetent and hearsay.

A. H. PIERSON.

(There was no cross-examination.)

I do further certify that the testimony so given by the said witness A. H. Pierson was reduced to typewriting by me as the same appears at large above and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of said witness appearing above.

Thereupon, the plaintiff called a witness, ANTHONY R. PITSER, who being by me carefully examined and duly sworn to testify the truth the whole truth and nothing but the truth in said cause, was examined by counsel orally and gave answers and testimony as follows:

Testimony of the Witness Anthony R. Pitser.

Examined by Mr. LOCKE:

Q. Please state your name, age and place of residence?

A. My name is Anthony R. Pitser, age 58, residence Newark Ohio.

Q. What official position if any do you hold, in Licking county?

A. I am county auditor.

Q. Please state whether you, in your official capacity are the custodian of returns made by tax assessors of taxable property owned in Licking county?

A. I am.

Q. Please state whether you have made a search among the files of your office for the official returns of taxable personal property belonging to Mrs. Jennie M. Smythe, at the date at which property was taxable in the year 1903.

A. I have not, I will do so if you desire it.

472 Q. I *which* that you would do so.

(The witness retired for the purpose of making the search, above mentioned and upon his return answered the question as follows:)

A. There is no return on file for taxation; there was no property returned.

Q. Please state whether you have any special recollection of the return or lack of return of property for taxation by Mrs. Jennie M. Smythe.

A. I have.

It had been reported that she had a large amount of money, and I called in the assessor and had him make a special return for taxation if he could so do.

Defendants' counsel moved to strike out the above answer as incompetent and because it is hearsay.

Q. Please state if you can, as a matter of your personal memory independently of the search you have made, among your files, whether Mrs. Smythe returned any personal property for taxation for the year 1903.

A. She did not.

Q. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I know nothing about the lady or about the case except what I have learned from newspaper reports.

(No cross examination.)

A. R. PITSER.

I do further certify that the testimony so goven by the said witness Anthony J. Pitser was reduced to typewriting by me, as the same appears at large above and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of the said witness appearing above.

473 Thereupon the plaintiff called a witness, CHARLES H. SPENCER, who being by me carefully examined and sworn to testify the truth, the whole truth and nothing but the truth in the said cause, was examined by counsel orally and gave answers and testimony as follows:

Testimony of the Witness Charles H. Spencer.

Examined by Mr. LOCKE:

Q. Please state, your name age, and place of residence.
A. My name is Charles H. Spencer, age 34, years; place of residence Newark, O.
Q. In what business are you engaged Mr. Spencer?
A. I am engaged in the newspaper business?
Q. With what paper are you connected?
A. I am associate editor of the Newark Ohio, Daily Advocate.
Q. Please turn to the article on page 8 of the issue of the Newark Daily Advocate of Jan. 29, 1897, headed: "Hunter is alive," and state if you know from what source the information contained in that article was derived.
A. The information upon which the article referred to was based came from Utica Herald and from a letter written by David G. Wallace who at that time was in Nashville, Tennessee.

Defendants' counsel move to strike out the above answer as immaterial and incompetent.

Q. Were you acquainted with Mr. David G. Wallace.
A. I was.
Q. Who wrote the article in question?
A. I did, according to my best recollection.
Q. Did you see the letter from Mr. Wallace to which you have referred.
A. Yes, sir, I did.
Q. Have you that letter now in your possession?
A. I have not.
Q. Do you know what became of it?
A. Communications of this sort are usually thrown away—thrown into the waste basket, and I have no doubt but what this let-
474 ter suffered the same fate.
Q. Please state if you know whether a copy of the issue of your paper of Jan. 29, 1897, containing the article "Hunter is alive" was sent to William A. Hunter, Sr. or Homer, Ohio or to any member of his family.
A. My recollection is that I mailed a copy of the paper of that date to a member of the Hunter family at Homer. My purpose in doing so was to convey information of Hunter's safety to the family.
Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this

cause, or either of them, or that may be material to the subject of this, your examination or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. Several years ago I gave testimony in the Hunter case but I have no means of refreshing my memory; it is possible that the statement made at that time go more fully into the case than I am able to do so now. I can think of nothing further that would be of interest to either of the parties.

No cross-examination.

CHAS. H. SPENCER.

I do further certify that the testimony so given by the said witness Charles H. Spencer, was reduced to typewriting by me as the same appears at large above and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of the said witness appearing above.

I do further certify that the depositions of the witnesses above named contained on the foregoing 127 pages have been retained by me in my possession until this moment and that I am now sealing the same and addressing the same for transmission by mail to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony, whereof, I have hereunto set my hand at Newark, Licking Co., O., this the 14th day of September A. D. 1904.

CHAS. C. COOPER,
Special Examiner.

475 Fees.

Examiner's fees	$38.40
Witnesses' fees in addition to the fees and mileage paid by the U. S. marshal to the witnesses Mrs. Birdie J. Yoakum $1.50 Miss Clara B. Hunter $1.50 D. G. Wallace, $1.50 A. R. Pitser $1.50 total witnesses' fees paid at the hearing	6
	$44.40

All the above fees have been this day paid in full by Maurice E. Locke, attorney for the plaintiff.

CHAS. C. COOPER,
Special Examiner.

No. 597 Eq.

Filed Dec. 24, 1904.

J. H. FINKS, Clerk.

476 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

I, J. C. Craig, who was specially appointed an examiner in the above styled cause by order of the court, made August 25", 1904, do hereby certify that at two o'clock in the afternoon of Thursday, September 15", 1904, at my office in Clyde, Sandusky county, Ohio, I was attended by Mr. Maurice E. Locke, of counsel for the plaintiff, for the purpose of examining witness in said cause, orally, in accordance with the provisions of the 67" rule in equity and other relevant rules and statutes, and in pursuance of said order, but no appearance was entered for the defendants, or any of them.

Thereupon the plaintiff called as a witness F. J. HUNTER, who having been by me carefully examined and duly sworn to testify to the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony, as follows:

Testimony of Witness.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence?
A. Dr. F. J. Hunter, reside at Clyde, and age is 31 years.
477 Q. What is your occupation?
A. Practicing physician.
Q. Where did you reside before coming to Clyde?
A. Newark, Ohio.
Q. Were you engaged in the same occupation there?
A. Yes, sir.
Q. At what street and number was your office located during the months from November, 1903, to March, 1904?
A. At 62 East Main until Dec. 8th, 1903; after that I was at 103 West Main.
Q. Your office at that time was at Newark?
A. Yes.
Q. During the time that you were living at Newark were you living with your father's family.
A. Yes.

Q. Was Mistress Jennie M. Mettler living with the same family?
A. Part of the time, from about the middle of Oct., 1902, up to May, 1903.
Q. What family relationship exists between yourself, if any, and the lady whose name is now Jennie M. Smythe, but was formerly Jennie M. Mettler, and William A. Hunter, Jr.?
A. Sister and brother.
Q. You are brother to both of them?
A. Yes.
Q. Where was Mrs. Mettler living during the summer of 1902?
A. At my father's in the country at Homer, Ohio.
Q. About how often did you see Mrs. Mettler and converse with her during the years from 1899 to June, 1902?
A. Probably two or three times a year; during that time I was attending medical school at Columbus, O.
Q. During the summer of 1902 where were you?
A. I was at home with my father, at Homer, O.
478 Q. Please state whether Mrs. Mettler ever talked with you about the question of whether your brother William was alive or dead before April 27th, 1903; and if she did, then state what she said to you?
A. The subject was really never discussed between us.
Q. Please state whether Mrs. Mettler ever mentioned to you having collected a note belonging to your brother William and having taken possession of some fifteen hundred dollars of county script and other property belonging to him at the time of his disappearance; if so, state what she said.
A. She never talked particularly to me about it, but in my presence she mentioned of having so much script belonging to him.
Q. Please state whether she ever spoke to you of having a distribution of the property left by your brother William when he disappeared, and of giving you your share of it.
A. Nothing at all.
Q. Please state what was the general reputation in your family in Licking county up to the time of the trial of Mrs. Mettler's suit against the insurance company in 1900, as to whether your brother William was alive or dead?
A. Always considered him dead.
Q. I show you a letter dated December 20th, 1902, at 62 East Main street, Newark, Ohio, written on five sheets of note paper, each of which is marked at the bottom, in red ink, "Exhibit A," the letter being signed Dr. F. J. Hunter; please state whether this letter was written by yourself?
A. Yes, sir, it was.
Q. I show you an envelope accompanying the above mentioned letter, the envelope being addressed to Mr. J. B. Gibson, Pecos, Texas, and post-marked Newark, Ohio, December 23rd, 1902; please state whether this is the envelope in which you mailed that letter?
A. Yes.

479 Q. Please state whether you received from Mr. Gibson a reply to your letter of December 20th, 1902 above mentioned?

A. Yes.

Q. I show you a letter of four pages, written on three sheets of note paper, the words *of* "Exhibit B" being written in red ink at the foot of each page, the letter being dated at 62 East Main street, Newark, Ohio, February 16th, 1903, and signed Dr. F. J. Hunter. Please state whether this letter was written by yourself; and if so, whether it was written in answer to the letter you received from J. B. Gibson in reply to your letter of December 20th, 1902, from him?

A. It was written by me and in response to his letter.

Q. I show you an envelope accompanying the letter marked "Exhibit B," which envelope is addressed to Mr. J. B. Gibson, Pecos, Texas. State whether this is the envelope in which you mailed the letter marked "Exhibit B"?

A. Yes.

Q. I notice on pages one and two of the letter marked "Exhibit A," that you make mention of a registered letter and say concerning it, "I know what you said in substance; also I know what she said about you." Have you that registered letter?

A. No.

Q. By whom and to whom was that registered letter written?

A. By J. B. Gibson and to Mrs. Mettler.

Q. Please state as nearly as you can remember the substance of what Mr. Gibson said?

A. In substance he complained that she had not paid him sufficiently for his work for her in the case against the insurance company.

Q. What did Mrs. Mettler say to which you refer in your letter?

A. In substance she said that Gibson was complaining that he was not treated right by her and her attorney Clark.

480 Q. I notice that on page 3 of the letter marked "Exhibit A," you say "I never believed him dead until a year or so ago." To whom were you referring?

A. I was referring to William A. Hunter.

Q. Please state whether you shared in the general family belief up to the time of the trial of Mrs. Mettler's suit against the insurance company, in 1900, that your brother William was dead?

A. No.

Q. Please state whether Mrs. Mettler took your deposition in her suit against the insurance company?

A. No.

Q. I notice on page 3 of the letter marked "Exhibit A" you say, "I never believed him dead until a year or so ago; then I knew somethin- was crooked somewhere; & I know now where." What was it that you knew was crooked when you wrote this letter?

A. That referred to her appropriation of his property.

Q. Please state what was Mrs. Mettler's conduct at home with reference to talking freely about her brother William and his affairs or being reticent upon the subject?

A. She had very little to say.

Q. What, if anything, did Mrs. Mettler ever say to you after the arrest of her brother William in regard to him or his disappearance or her suit against the insurance company?

A. She expressed her surprise and said she knew nothing about him.

Q. What, if any, steps were taken by Mrs. Mettler or by any other members of the family to ascertain whether the man reported to be arrested at Birmingham, Alabama, was in reality William A. Hunter?

A. Nothing that I know of. My uncle wrote down there to a friend of his to ascertain who it was, and if it was William A. Hunter, and got no satisfactory reply.

481 Q. Mrs. Mettler received something more than $11000.00 as her part of the insurance money. Please state, so far as you know, what disposition she made of it?

A. She never talked to me about those matters; I know nothing about it, except that she bought a house and lot in Newark, O.

Q. Please state whether you have ever seen your sister Jennie M. Smythe write, and whether you have received letters from her in due course of mail in response to letters written by you?

A. Yes.

Q. Please state whether you are familiar with her handwriting?

A. I am fairly familiar with her writing.

Q. I hand you a letter dated at Pecos, Texas, January 2, 1897, addressed to the Fidelity Mutual Life Association, of Philadelphia, and signed Jennie M. Mettler. Please state in whose hand-writing said letter is written in your opinion?

A. In my opinion it is in the handwriting of Jennie M. Mettler

Q. Do you know, or can you set forth, any other matter or thing that may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No.

No cross-examination.

DR. F. J. HUNTER.

I do further certify that the testimony so given by the said witness, F. J. Hunter, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over to the said witness and was signed by the said witness in my presence and in that of the counsel above named, the genuine signature of said witness appearing above.

482 I do further certify that I have retained the deposition of the said witness contained in the foregoing seven pages in my possession until this moment, and that I am now sealing the same, and addressing it for transmission by mail to the circuit court of the United States for the northern district of Texas, at Dallas.

In testimony of all of which I have hereunto set my hand at my office, in Clyde, Sandusky county, Ohio, this, the fifteenth day of September, A. D. 1904.

Signature of Special Examiner, J. C. CRAIG.

Examiner's fees for taking the above testimony was this day paid in full by Maurice E. Locke, attorney for the plaintiff, amount $4.00.

Sept. 15, 1904.

J. C. CRAIG,
Special Examiner.

Indorsed as follows: 597 Eq. Filed Dec. 24, 1904. J. H. Finks, clerk.

483 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, v. JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Co., Defendants.	No. 597.	In Equity.

I, Geo. W. Parker, who was specially appointed an examiner in the above styled cause by order of the court made August 8th, 1904, do hereby certify that at ten o'clock in the forenoon of Monday, January 30, 1905, at the rooms of the circuit court of the United States for the northern district of Texas, at Dallas, I was attended by Mr. Maurice E. Locke, counsel for the plaintiff, and by M. L. Crawford and M. A. Spoonts, of counsel for the defendants, for the purpose of examining witnesses in said cause orally in accordance with the provisions of the 67 rule in equity, and other relevant rules and stat-es, and in pursuance of said order, and in pursuance of an order made in open court allowing to the plaintiff time for taking said depositions to rebut the deposition of Mrs. Jennie M. Smythe, filed this day by the defendant by consent of counsel for the plaintiff, given upon condition that he have time for the taking of such rebuttal evidence.

Thereupon the plaintiff called as a witness M. L. CRAWFORD, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said
484 cause, was questioned orally by said counsel and gave answers and testimony as follows:

Testimony of the Witness M. L. Crawford.

Direct examination by Mr. LOCKE:

Q. Please state your name, age and place of residence.

A. M. L. Crawford, residence Dallas, Texas, age 63 years old.

Q. In what profession are you engaged, and how long have you been so engaged?

A. Practicing attorney, and have been — 1869 or 1870.

Q. You are the senior member of the firm of Crawford & Crawford?

A. I am the senior member of the present firm of Crawford & Crawford.

Q. Are you of counsel in the present case for Jennie M. and James N. Smythe?

A. I am, and was employed by W. H. Clark, the past week.

Q. Did Mr. Clark employ you in his own behalf or as a representative of Mrs. Smythe?

A. To look after both interests, Mr. Clark paying the fee.

Q. Were you and your firm counsel for William A. Hunter, alias William A. Hunt, in his defense against the charge of swindling preferred against him by the grand jury of Dallas county, in the year 1903?

A. The firm of Crawford & Crawford, then composed of W. L. Crawford Senior, and myself, was employed to represent the defendant William A. Hunt, alias William A. Hunter, in the above case. I tried the case, Colonel Crawford being absent from the county, and had nothing to do with the preparation or trial. This employment was in November, 1903.

Q. Please state whether you are acquainted with Mr. R. N. Bell, an attorney of Birmingham, Ala., a member of the firm of Shugart & Bell of that city?

A. I am.

485 Q. Please state whether he also was of counsel for the defendant Hunter alias Hunt?

A. He was, and assisted in the trial of the case before the jury and filed a brief in the court of criminal appeals.

Q. Please state about how old and experienced a man Mr. Bell was?

A. I would take Mr. Bell to be a man forty-five or fifty years old; he manifestly has had considerable experience in the management of criminal cases, and I regard him as a lawyer of first class ability.

Q. Did you also file a brief for the defendant in the court of criminal appeals?

A. I did and argued the case.

Q. Where did the argument of the case take place?

A. Austin.

Q. About when was the defendant Hunter, alias Hunt, brought to Texas by the extradition agent?

A. I think he was brought to Texas, about the 27th of November, 1903. It was upon my advice that Hunter abandoned his opposition to the extradition and came to Texas.

Q. Did Mr. Bell accompany him to Texas on that occasion?

A. He did.

Q. So far as you know had Mr. Bell been here before that time to arrange the preliminary matters?

A. So far as I know, he had not; I had never seen him, but had had correspondence with him.

Q. When Mr. Hunter came to Texas, November 27th, was he placed in jail or released upon recognizance?

A. He was released upon recognizance.

Q. Who were the sureties on that recognizance?

A. Myself, and I believe W. B. Taylor.

Q. Had either you or Mr. Taylor previous acquaintance with Mr. Hunter?

A. I had never seen Mr. Hunter before, and I am satisfied Mr. Taylor had not. Taylor became one of his sureties at my
486 special request, and upon my promise to indemnify him against loss.

Q. When Mr. Hunter was released upon recognizance November 27, 1903, where did he go, if you know?

A. I think he went back to Birmingham.

Q. When and for what purpose was he next in Dallas?

A. To stand trial in answer to the grand jury indictment for swindling, I think it was about the first of March, 1904.

Q. Who accompanied him to Texas on that occasion?

A. Mr. Robert M. Bell and one or two friends from Brookside, whose names I cannot now recall.

Q. Was the case tried at that time?

A. It was not; it was continued by the State.

Q. When next did Mr. Hunter appear in Dallas?

A. In April, 1904.

Q. For what purpose?

A. For the purpose of standing trial on the charge preferred against him by the grand jury.

Q. How many bills of indictment were found against Mr. Hunter?

A. Two, one for conspiracy for swindling, and the other for swindling.

Q. Did you and Mr. Taylor as sureties make recognizance in both cases?

A. The recognizance as sureties was only made in one case. In the other Hunter's personal recognizance was taken.

Q. When Mr. Hunter came here in April who accompanied him?

A. Mr. Bell and one or two friends from Brookside, Ala., a town near Birmingham; I don't remember their names.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, upon the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. When I met Mr. Hunter in the office of the sheriff of
487 Dallas county, in November, about 27th, he was accompanied by Mr. Robert N. Bell; we had previously agreed by correspondence that my fee should be one thousand dollars. I had assured Mr. Bell that the bond for Hunter's appearance would not exceed one thousand dollars. To indemnify me for becoming surety on Hunter's bond Mr. Bell handed me a draft of one thousand dollars drawn by some bank in Birmingham, upon a bank in New York, with the understanding that if Hunter made his appearance according to the terms of the bond that I should use the thousand dollars in payment of my fee. I attempted to get from Mr. Bell the money for the fee as well as money to indemnify me as surety. He stated that Hunter's means were tied up by litigation in Birmingham, and that this thousand dollars was all that he could raise. During the progress of the trial and after Hunter's conviction it became necessary to expend some money in the preparation of the transcript and printing the briefs. The motion for a new trial was overruled at 2 o'clock on Wednesday, and the next succeeding Wednesday was the last day upon which argument could be heard in the court of criminal appeals at that term, and it required the employment of an extra force to assist the clerk, working day, night and Sunday to get out the transcript. In this, and for printing the briefs, and my expense to Austin, I expended about two hundred and forty dollars. The case in the court of appeals was reversed and the prosecution dismissed on the Wednesday following its submission, and Mr. Hunter discharged from custody. He came to the office and we had a settlement, and in paying these expenses he gave me his note signed William A. Hunt, for about two hundred and forty dollars, payable at some bank in Birmingham, ninety days, or four months from date. He paid this note shortly after its maturity.

On cross-examination the witness, without being specially interrogated, states as follows:

Amongst other papers furnished me by W. A. Hunt, alias W. A.
Hunter, was a bank-book in a private savings bank at Bir-
488 mingham, Alabama. This book——

The plaintiff objects to any testimony relative to the contents of the savings bank book upon the ground that same is secondary evidence, and that no effort has been shown to have been made to procure the original book, and on the further ground that same is irrelevant and immaterial and incompetent.

WITNESS: This book was delivered to Mr. Hunter after his discharge from custody; it showed a gradual accumulation of funds in small amounts covering a period of four or five years.

Mr. SPOONTS: What was the total amount?

A. It was less than three thousand dollars.

Q. Was there a written opinion rendered by the court of appeals in the case?

A. Yes, sir, by Judge Henderson.

Q. Do you know where it was reported?

A. It was reported in the Southwestern; I have forgotten the number. I believe volume 81, folio 730. The indictment referred to for conspiracy to swindle was dismissed by the county attorney of Dallas county because he could not obtain the proof to establish the conspiracy, so he told me.

Plaintiff moves to strike out what the county attorney said.

Mr. LOCKE: It is true, is it not, that the ground upon which the court of criminal appeals reversed the judgment and dismissed the prosecution was that the Texas statutes against swindling does not cover the procurement of a judgment by fraudulent devices and the subsequent collection of money on that judgment?

A. The opinion speaks for itself; I do not so understand. I understand the opinion to be in substance that the receipt of money under a judgment rendered by a court of competent jurisdiction is not swindling.

The defendants here offer the opinion in evidence, and it is agreed that the same may be read from the Southwestern
489 Reporter without being copied herein.

M. L. CRAWFORD.

I do further certify that the testimony so given by the said witness M. L. Crawford, was reduced to typewriting as the same appears at large above, and afterwards was read over by the said witness and was signed by the said witness in my presence and such of the parties or counsel as were in attendance, the genuine signature of the said witness appearing above.

I do further certify that I have retained in my possession until this moment the depositions of the witness hereinbefore named, and that I am now sealing and delivering same in person to the clerk of the circuit court of the United States for the northern district of Texas.

In testimony of all of which I have hereunto set my hand at Dallas, this the 30 day of January A. D. 1905.

GEO. W. PARKER,
Special Examiner.

My fee for taking this deposition is $3.00.

490 Testimony of the Witnesses M. A. Spoonts, W. M. Alexander and Wm. H. Clark.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Complainant,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Co., Defendants. } No. 597. In Equity.

I, Geo. W. Parker, who was specially appointed an examiner in the above styled and numbered cause, by order of court made August 8th, 1904, do hereby certify that at eleven o'clock in the forenoon of Tuesday, December 27th, 1904, at the office of Etheridge & Baker, Dallas, Texas, I was attended by M. A. Spoonts, William H. Clark, W. M. Alexander and F. M. Etheridge, of counsel for the defendants, and by Maurice E. Locke Esquire, of counsel for the complainant, for the purpose of examining witnesses in said cause orally in accordance with the provisions of the 67 rule in equity, and other relevant rules and statutes, and in pursuance of said order.

Thereupon the defendants called as a witness M. A. SPOONTS, who having been by me carefully examined and duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, was questioned orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness M. A. Spoonts.

(Direct examination by Mr. ALEXANDER:)

Q. You are one of the defendants in the equity cause?
A. Yes sir.
Q. When did your connection first begin with the original case of Jennie M. Mettler *v.* The Fidelity Mutual Life Insurance Company—about what time?
A. Some where about the first of May 1899.
Q. Was the case at the time of your connection—had it been transferred from the State to the Federal court?
A. Yes sir.
Q. Had it ever been tried?
A. Not to my knowledge.
Q. State in a brief way how you came to be connected with the case?

491 A. My connection with the case arose in this way: I had a telephone communication from Mr. Clark: he telephoned me from Dallas to my office in Fort Worth some where about May 1st 1899, and told me that such a case was pending and his firm were attorneys for the plaintiff and that recently prior thereto—prior to his conversation with me Mr. John W. Wray of Fort Worth, had also been associated with the defendant's attorneys and he wanted me to assist in the case. I had a little talk over the phone about the matter: I am not sure whether he came to Fort Worth or whether I came to Dallas, but I am inclined to think I came to Dallas, and we talked over the matter. At that time they were endeavoring—plaintiff's attorneys were endeavoring to get the deposition of Milliken and Milliken had left Dallas and was at Fort Worth, that is, he was at Fort Worth at the time Mr. Clark telepho. l me about the matter, but left there before the commission to take the deposition could reach there.

Q. After your connection with the case was the case continued?

A. The case was not tried the first term of the court after it I don't think, I don't know why: I don't remember why.

Q. Do you remember whether or not the plaintiff asked a continuance or whether the defendant asked a continuance at the first term after your original connection with the case, after you were retained?

A. My recollection is not definite on that point but I am inclined to think the defendant continued the case: I don't think I was present however, when the case was continued.

Q. When the case was finally tried in the United States circuit court at Dallas, do you remember whether or not the plaintiff—whether or not the complainant attempted to continue the case?

A. No sir, I don't remember: there were two trials of the case after I was connected with it: we commenced—I would not be certain about the date: we started on the trial of the case and consumed two or three days in the trial and Judge Meek got sick and it went over until the next term, and the next term of court it was tried, but what efforts there were about continuing it I don't recollect.

Q. After you became connected with the case state whether or not you talked with the plaintiff and other witnesses?

A. Well, I didn't have very much to do with the talking with the witnesses in the case: the testimony in so far as the depositions was concerned had already been taken prior to my connection with
492 it, and I don't recollect ever having any conversation with the witnesses except about the time of the various trials we had the witnesses in the office and went over it with them; that was in your office (Mr. Alexander). I remember upon one occasion having a little conversation with Mrs. Mettler, but when that was with reference to the trial I don't know. She was in Fort Worth, and was going to leave the State or was going off some where, I

don't remember where. She came to my office and told me she was going away.

Q. You participated actively in the trial?

A. Yes sir, as actively as I was capable of.

Q. Was there any circumstance that impressed you from your first connection with the case until the final disposition of it, of any want of good faith on the part of the plaintiff?

A. Absolutely nothing. I never had my suspicion aroused about the good faith of the transaction. Mrs. Mettler impressed me as an earnest, straightforward woman.

Q. On the main issue of the case as to the death or not of the assured, Hunter, was there evidence introduced pro and con to sustain the contention?

A. Yes sir.

Q. Numerous witnesses were introduced?

A. Yes sir, in fact that was about the only issue upon which there was very much testimony taken at the time of the trial. There was an agreement made on the trial that eliminated a great many other questions.

Q. That main issue depended on circumstantial evidence?

A. Yes sir, exclusively.

Mr. ETHERIDGE: At the time the case was actually tried, when it was called for trial, did both parties announce ready for trial, or did either apply for a continuance?

A. I don't remember Mr. Etheridge, if the plaintiff applied for a continuance or not.

493 Q. You don't remember that it voluntarily announced ready for trial?

A. I cannot testify as to that now.

Mr. ALEXANDER: I would suggest that as Mr. Spoonts don't recollect that—I understand the records show there was an application for a continuance by the plaintiff.

Mr. SPOONTS: I don't recollect.

Mr. ALEXANDER: We offer in evidence the docket entries:

Mr. ETHERIDGE: In addition to your having no suspicions as to any want of good faith on the part of the plaintiff in the law case, how did she come recommended by people who knew her intimately and for a long time, and how was she spoken of by people who knew her?

Mr. LOCKE: Complainant objects, on the ground or immateriality and irrelevancy.

Mr. SPOONTS: I knew several parties who knew Mrs. Mettler quite well, though I had no personal acquaintenance with her prior to this—my connection with the case. They all spoke well of her; she was a woman, so far as I knew, of good character and good standing.

Q. You had no connection with the case other than in your professional capacity?

A. None whatever. I knew Hunter myself personally slightly; he boarded at one time with Mr. Schwarz who lived just across the street from me at Fort Worth, and I also knew him when he was deputy clerk of the court up in Hardeman county; I practiced law in that court.

Q. Deputy district or county clerk?

A. I think perhaps the offices were combined. Any way, he was around the district court, and I had cases in that court each term of the court and I knew a good many people up there who knew him; they always spoke very highly of him.

Q. Up to the time of the termination of this case—the case in which Mrs. Mettler was plaintiff, did you have any reason to revise your good opinion of Mr. Hunter, the assured?

A. None whatever.

Q. I don't know whether it has been asked or not, if not, I will ask: Were the fees charged by yourself and associates usual and customary and reasonable, or otherwise?

494 A. Well, my connection with the fee question is in a different attitude from other counsel. I will make this statement in that connection. At the time Mr. Clark spoke to me about assisting in the case we never had any contract about a fee. Mr. Clark simply stated that he would make the matter satisfactory, and we had no understanding one way or the other; I didn't know what his contract with Mrs. Mettler was; never knew until this bill was filed. After the case was affirmed in the supreme court I had a letter from Mr. Clark stating that the case had been affirmed and making some suggesting about the fee that I would charge him in the matter, and there was some correspondence between us and I came over to Dallas to see Mr. Clark and we finally agreed on a fee of fifteen hundred dollars and it was paid me in the matter. Mr. Clark gave me an order on the clerk of the United States court here in which he—just a memorandum, telling the clerk to pay me $1500 out of the fund when collected. I left that order with the clerk: I notice in the clerk's deposition that order is not attached and is not among the papers. Subsequently—when I was in Mr. Clark's office in Dallas, after he and I had agreed on a fee, he gave me a little memorandum written out with a pen on a sheet of paper, addressed to the clerk directing him to pay me $1500 when the money was collected. I left that order with the clerk, and that was sometime in the early part of May, 1902 I think, later, after I returned to Fort Worth, I got a letter from Mr. Clark, a copy of which is set forth in Mr. Finks's deposition, dated May 6, 1902, notifying me that the judgment had been paid. I enclosed that letter with a letter to the clerk, a copy of which is attached to Mr. Finks' deposition, and he sent me a check for $1500, with a receipt attached for me to sign which I did and returned to him. I took that check and transferred it to the Fort Worth national bank—endorsed it to the bank and they gave me credit for it; the money was checked out by me; two thirds of it—one third of it went to each of my partners, $500 went

to Mr. Stanley and $500 to Mr. Thompson and when I deposited that check it was placed to my credit in the bank. I notice
495 in a letter that I wrote Mr. Finks, I say "I have an interest of $1500 in said judgment, which you will please remit to me at Fort Worth as soon as the money is paid over to you." The interest I had in the judgment was simply the order Mr. Clark gave me; there was no assignment of any interest in the judgment to me, and there was no transfer to me except the order Mr. Clark gave me to the clerk directing him when the money was collected to pay me $1500. None of the actual cash ever came into my possession except in the way I have indicated.

Q. Did you assist in the preparation of the brief that was filed on behalf of Mrs. Mettler in the Supreme Court of the United States?

A. No, sir.

Q. Didn't participate in the argument?

A. No sir, my connection I considered limited to the trial court.

Q. Did Mr. Clark practically perform the detail labor of the preparation of the case for trial?

A. Yes sir, entirely. I took no testimony and depended upon him entirely in that respect; in fact he didn't call on me for any services of that kind; he wanted my assistance in the trial of the case in the circuit court and that is about all I did.

Q. Referring to your fee, as to whether that was reasonable or otherwise.

A. I think it was reasonable, it was less than I contended for, but Mr. Clark thought that was enough, and we finally agreed on it.

Cross-examined by Mr. LOCKE:

Q. At the time of your original conference with Mr. Clark, or at the time of the telephone conversation that preceded it, did Mr. Clark tell you the general nature of the litigation?

A. Yes, whether what he stated to me was over the telephone or in the conference a few days afterwards, I cannot say, I can't separate the two conversations.

496 Q. At the time you undertook to assist Mr. Clark you knew the principal controversy was over whether Mr. Hunter was dead?

A. I knew that was the controverted issue.

Q. The plaintiff claimed he was dead and the defendant claimed he was not dead?

A. Yes sir.

Q. You have not the written order Mr. Clark gave you to the clerk?

A. No sir, I presumed it was attached to the clerk's deposition, but it is not.

Q. You have not see- it since?

A. No sir.

Q. You say the order directed the clerk to pay you $1500 out of the fund?

A. Yes, I presume it was, it was an order to pay me $1500, and I suppose it was out of the fund.

Q. It was the understanding between you and Mr. Clark that it was out of the fund?

A. Yes sir.

Q. It was not a general order out of any fund Mr. Clark might have?

A. No sir, it was out of the fund collected on this judgment.

Mr. SPOONTS: I presume I have made myself clear; I knew nothing of the contract between Mr. Clark or his firm, and Mrs. Mettler I didn't know what their arrangements were; I didn't know what Mr. Clark had got out of the transaction until the bill was filed in this case.

Mr. LOCKE: In the understanding you had with Mr. Clark, was your fee to be contingent upon the result of this case?

A. There never was a word said about that one way or the other.

Q. What was the tacit understanding?

A. I anticipated that Mr. Clark was getting a contingent fee, but Mr. Clark and I had been close friends and if Mr. Clark had asked me to assist him and stated he couldn't pay me I would have done it. I understand he was getting a contingent fee and would make some satisfactory settlement with me when the matter was over; I was entirely willing to trust Mr. Clark; I knew him to be an
497 honorable, reputable lawyer and had been an intimate friend of mine for a number of years. I will state that it is not unusual for an attorney having a case to employ other attorneys to assist him in the matter, and that there was nothing unusual in the way in which I was employed by Mr. Clark. I will state further that I never looked to Mrs. Mettler for any fees in the case and never had any connection with her other than to assist Mr. Clark. I didn't consider that she owed me anything, and didn't look to her for anything and was controlled by Mr. Clark in the litigation. I will say further that there was no interest in the policies or in the judgment secured on them ever transferred to me, except the order given by Mr. Clark to me to the clerk to pay me $1500. I will state further that at the time I received that money from Mr. Clark I did so in good faith, honestly believing that Hunter was dead, and that the case had been correctly decided.

(Adjourned until 1:30.)

Mr. ALEXANDER: Mr. Spoonts, you have examined the contract on file in the law suit for attorneys' fees?

A. I examined the copy of it attached to Mr. Finks' deposition since we adjourned at noon.

Q. How long have you been practicing law in Texas?

A. Twenty-five years.

Q. You are general attorney for the Fort Worth & Denver railroad?

A. Yes sir.

Q. How does the form of contract you examined conform to the usual contracts for contingent fees as is usually taken by attorneys in the State?

Mr. LOCKE: I object on the ground that the question is irrelevant and immaterial, and it apparently tends to evoke the information of the witness on a question of law, and if it be intended to obtain the opinion of the witness as to the customary form of contracts for contingent fees in other cases it is irrelevant to this litigation.

Mr. ALEXANDER: It is with the idea that the witness is qualified to testify as an expert as to the form of contracts, the idea being
498 that the contract is not an unusual contract, it is in accordance with the general method and genereal practice.

The witness, Mr. SPOONTS: I suppose I will have to rule on the objection, as there don't seem to be any one else to do it. Of course I have had a great deal to do with these contingent fee contracts; every lawyer who brings a suit against a railroad has a contract of this character; the general trend of it is about the same as with the ordinary contracts taken throughout the country.

Q. Ordinarily these contracts provide for one-half in contingent cases?

A. Well, they run from one-fourth to one-half.

Mr. LOCKE: It depends upon *who* good a case he has?

A. Yes sir.

Q. If it is a bad case they sometimes give half?

A. It depends upon how bad they want a lawyer.

Mr. SPOONTS: Mr. Clark called my attention to the fact that I didn't have any of this original money on hand?

Mr. LOCKE: I take judicial cognizance of that fact.

Mr. SPOONTS: Outside of the thousand dollars that I gave Thompson and Stanley, I checked it all out.

Mr. ALEXANDER: At the time you received it you had no idea there would be such a claim as this?

A. No sir, or I would not have received it.

Q. What was your understanding of Mr. Clark's fee at the time you settled with him? At the time you settled with him, how much was he to get?

A. I knew he was to get a large fee, but the amount I didn't know.

Q. About what?

A. I understood he was to get some eight or ten thousand dollars, something like that.

M. A. SPOONTS.

I do further certify that the testimony so given by the said witness M. A. Spoonts was reduced to typewriting by me as the same appears at large above, and was afterwards read over by the
499 said witness and was signed by the said witness, and of such of the parties or counsel as were in attendance, the genuine signature of the witness appearing above.

Thereupon the respondents called as a witness WILLIAM H. CLARK who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel, and gave answers and testimony as follows:

Testimony of the Witness William H. Clark.

Direct examination by Mr. ALEXANDER:

Q. You are the defendant named in the equity cause, one of the defendants?

A. William H. Clark, the defendant William H. Clark.

Q. How long have you been practicing law Mr. Clark?

A. Been practicing since 1885.

Q. During all that time at Dallas?

A. Begun the practice here.

Q. What has been your relation to the bar of Texas since you commenced the practice—what branch has it been and what relation——

A. I have practiced civil law exclusively.

Q. You practice generally, over the State?

A. Yes, State and Federal courts.

Q. Ever hold any official position in connection with the bar of Texas?

A. I have been president of the Texas Bar Association.

Q. What year.

A. I think 1897 and 1898.

Q. Now state briefly your connection with the original case entitled Jennie Mettler against The Fidelity Association, the plaintiff in this case? The original was at law, referred to in the pleadings in this case. State your connection with it—what was your firm at the time and how the case came to your firm?

A. At the time my connection with this case begun I was a member of the firm of Alexander, Clark & Hall of Dallas. Some-
500 time in the year 1897, I think it was in the spring, Mrs. Mettler, now Mrs. Smythe, came to Dallas with a letter of introduction either to me or to my firm, Alexander, Clark and Hall, I don't remember which, from Pecos, Texas, from R. D. Gage, introducing her and asking that I take her case. It merely referred to the nature of her case. In that connection I would state that Mr. Gage and I were college mates at the University of Mississippi for four years and intimate friends. We came to Texas in the same year, 1885, he locating at Pecos and I at Dallas, and our acquaintance and friendship kept up from that time to the present time. Mrs. Mettler delivered her policies to me I think, and in the name of my firm I took the case. For sometime we tried to compromise the case with the insurance company, and failing to effect a settlement of any kind, suit was filed later. The suit, to my recollection, was filed about the first of December 1897. The petition, or the

suit, was instituted in the district court at Dallas by Alexander, Clark & Hall as attorneys for Mrs. Mettler, and the case was removed to the Federal court at Dallas at the next term. After the case was removed to the Federal court, I would not be positive as to when the case was first called for trial.

Q. Do you remember what the announcement was by the respective parties?

A. I would not be positive as to the first term of court.

Mr. Lock-: The plaintiff objects, because he has already introduced the docket entries.

Mr. Clark: That is the best.

Mr. Alexander: During the pendency of the case, before the case was tried, was there any negotiation on the part of your firm with the defendant's counsel, or agent of the company for a settlement?

A. Before the institution of the suit and after the institution of the suit I took up the matter of the settlement of the case, and the other members of my firm did and tried to compromise the case—at one time—we did try to settle the case.

Q. Do you remember the substance of any proposition sub-
501 mitted by you on behalf of the plaintiff with respect to the settlement?

Mr. Locke: Plaintiff objects on the ground that it is irrelevant and immaterial, and that such negotiations are privileged.

Mr. Clark: I offered to settle the case for one half, $7500.00, and offered to give an indemnity bond that if Hunter should turn up within seven years that the money would be refunded to them at six per cent. interest. That proposition was made Mr. J. E. Gilbert, attorney for the defendant: I am not certain but what Col. Hall made it to Capt. Brown.

Q. Did you discuss the question of settlement with the president of the complainant company?

A. I was in Philadelphia on some other business and called on him and endeavored to take up the matter of settlement with him, but didn't go into negotiations, but on the other hand he was very insulting and said he didn't care to go into the matter; said it was a fraud and he didn't care to settle it upon any terms.

Q. Do you remember about the time of the dissolution of the firm of Alexander, Clark & Hall? About the time that occurred? If so, state about the time?

A. My recollection is it was 1898.

Q. At the time of the dissolution of that firm, that original law case was assigned to Alexander & Thompson in the division of the business was it not? Alexander, Clark & Thompson?

A. The firm of Alexander, Clark & Hall dissolved January 1st, 1898 Is not that correct?

Q. About that time.

A. In 1898, this case went to the firm of Alexander Clark &

Thompson successors of the firm of Alexander Clark & Hall, and Col. W. L. Hall retirned his interest in the case—his one third interest; the other two thirds interest went to the firm of Alexander, Clark & Thompson. Then, in January 1899 the firm of Alexander Clark & Thompson was dissolved and in the division of the
502 business of that firm the case came to me. I gave for the interest of Mr. Alexander and Mr. Thompson, my partners, in this case, my interest in certain fire insurance cases, the companies being the clients of Mr. Thompson, which one third interest amounted to something like $1100.00. That is not accurate, but approximately so. Later, I gave Col. Hall two lots in South Dallas, worth approximately $900 for his interest in the case.

The division between myself and my partners, Alexander and Thompson was before the trial of this case in the Federal court; the adjustment between Col. Hall and myself was after the trial and before the affirmance of the judgment in the Supreme Court of the United States. The transfers—endorsements on the powers of attorney from my partners to me was the only written evidence between us about the matter and was not made until the date of that power, which is May 29, 1902.

Q. Why was the suit filed—instituted at Dallas—the law suit?

A. The insurance company had no agent upon whom service could be had at Pecos, or any where near there, and at that time the Federal court had not been organized at Fort Worth, and if suit was brought at Weatherford or some other point where the company had an agent, I understood it would be transferred to the Federal court at Dallas, and that is one reason why my firm was employed in the matter on account of the litigation necessarily having to take place in the Federal court here at Dallas, Mr. Gage sending Mrs. Mettler with a letter to me, as already stated.

Q. What business is Mr. Gage interested in there, practicing law?

A. He began practicing law in 1885 and engaged very actively and had one of the largest practices in west Texas; the firm was Gage & Walthol. Walthol has lately been judge of the district court out there and for the latter few years and at the time this case arose, Mr. Gage was also engaged in the banking business. He is now engaged exclusively in the banking business, his bank interests having taken up all of his time

Q. State whether or not during your connection with that law suit from its incipiency to its termination, if any facts or circumstances caused you in the least degree to question the good faith of Mrs. Mettler the plaontiff, in presenting her claim as the beneficiary under the policies so pending?

503 A. There was not; I will state that before this suit was filed, after we were employed, I went to Pecos myself and talked with various parties there with reference to the case or claim for insurance and I found no one there who expressed any doubt to me as to Hunter's being drowned except Mr. R. S. Johnson. I talked with the merchant from whom Mr. Hunter bought his supplies; I

can't call his name now. He was the largest merchant there; one of the largest, if not the largest between Abilene and El Paso. He told me in reference to Mr. Hunter's purchasing groceries and things from him—some supplies; while he didn't go up the river and examine the camp or anything of that kind, he, as well as all others, as heretofore stated, seemed to have no doubt of his being drowned, except Mr. R. S. Johnson, I learned that when the adjuster of the company, Mr. Milliken went to Pecos.

Mr. LOCKE: The plaintiff objects, on the ground that what Mr. Clark learned there on his first investigation at Pecos, is a matter of hearsay and is irrelevant.

Mr. ALEXANDER: State what facts you ascertained—what information you secured in the course of your investigation of this case at Pecos?

Mr. LOCKE: I make the same objection as above urged to the question.

Mr. CLARK: In addition to the matter as already stated, I learned that Mr. Milliken, the adjuster for the company went out there and called on Mrs. Mettler and was by her referred to Mr. Gage, and that as the printed proofs of death would not answer a case like this, it was agreed that Mr. Milliken should get up the affidavits and Mrs. Mettler and Mr. Gibson and others there rendered Mr. Milliken whatever assistance they could in getting up the affidavits and proofs of death, and give them names of the parties who had been to the camp, and gave him such other information as they had: Mrs. Mettler gave Mr. Milliken several long affidavits in answer to long questions propounded to her. I learned that Mr. Milliken rented him a room over the saloon of R. S. Johnson the witness in this case. I will state that Mr. Johnson owns there a large two-
story stone building and the downstairs was occupied by a
504 large saloon with some rooms in the rear of it, and there was
a stairway from the side of the saloon going upstairs, and the upstairs was divided into numerous rooms, nicely furnished; they were the best furnished rooms I saw while out there and they were rented out to traveling men and others who were passing through Pecos and stopped there on business. I also learned that Mr. Milliken was very liberal in the matter of treating around the saloon during the entire time he was there and up until the time he was there Mr. R. S. Johnson never expressed any doubts as to Hunter having been drowned, but after that he became very positive that Hunter was not dead and was in that state of mind when I was out there. My investigation caused me to come to the conslusion, which I will state was largely the result of the opinion of Mr. Gage, he knew the people, he knew the surroundings, and his opinion in the matter had more influence with me than my conversations with all the others put together. I returned home and the company would not compromise or settle the case on any terms and I continued to fight the case to the best of my humble efforts from that time until

the time the judgment was paid off, with the assistance of other counsel.

Q. You give a lien—give as collateral to the Phillips Investment Company, an interest in the judgment after it was obtained in the Federal court.

A. Yes, that was the only interest they had, was the security for the sum of $1500. During the boom I bought nine lots in East Dallas; I paid on these lots some six or seven thousand dollars, most of it being interest, and in 1901 I owed on that debt to the Phillips Investment Company $6721.57. They wanted a settlement, and I reconveyed them the lots at an agreed price of $5250 and tried to get them to take them back for the debt and they would not do it. I then gave them in addition to that deed, my note for $1471.57 and I transferred them my interest my contingent fee in this case to secure that note. The note and transfers is attached to Mr. Finks' deposition—copies of it.

Q. What was the amount of your fee—what amount was paid to you by the clerk?

505 A. $8346.00.

Q. How long did you retain that money?

A. I don't remember, but not long, I paid that out on different debts.

Q. When was that paid to you? Do you remember the date?

A. June 3, 1902.

Q. What amount of money did you have on hand on the 6th of June?

A. I don't remember.

Q. On the 10th.

A. I don't remember, by the 10th most of it had been paid out by me. General debts that I owed.

Q. You checked it out—after depositing it to your credit you checked it out to various creditors?

A. Yes sir?

Q. Do you know whether the amount of that judgment was paid before the mandate was returned?

A. It was paid several days before the mandate was returned. It was paid without any process. Before any process could issue. On the 3rd Mr. Finks called—telephoned me that the insurance company had paid the amount of the Mettler judgment and to come up, is my recollection.

Q. You collected and remitted to Mrs. Mettler the amount that was due her?

A. Yes sir, I did. I collected from the clerk—received from the clerk two checks, one to my own order for $8346 and another one payable to the order of W. H. Clark, attorney of record for Mrs. Jennie M. Mettler for $11.616. I took these checks and cashed them at the American National Bank of Dallas, the checks were drawn by J. H. Finks, clerk, and countersigned by Edward R. Meek, judge. I took that money and deposited it in the National Bank of Com-

merce of Dallas and the Exchange National Bank of Dallas in my name.

506 Q. When did you first hear that it was claimed that Hunter was—what did you do—what was done with the money?

A. The latter part of May I received a letter from Mrs. Mettler from Homer, Ohio, where her father lived and where she had been for some little time, I think practically ever since the trial of the case here; she told me to remit her money to the Wilson bank, of Utica, Ohio, and in the letter she said "My attorney's fee is one-third. I was to pay Mr. Culberson $500." after collecting the checks given me by the clerk and depositing it as heretofore stated. I wrote her a letter telling her that her attorney's fees was more than one-third, and I sent her a certified copy of both of the contracts she had made with the attorneys, advising her of the amount according to the contract that was due her attorneys. I also told her that instead of remitting the money to the Wilson bank of Utica, Ohio, that I preferred sending her New York exchange. I did that because I thought it was more business like; the money was in my hands and when I remitted to her I wanted it to be in such form that there would be no question at any time in the future about that transaction to have no question come up about the amount, not being the right amount or anything of that kind, and on June 23, 1903, I remitted her her money by three checks; I remitted her $11.160.50 by three checks; check No. 4516 of the National Bank of Commerce of Dallas, on the Hanover National Bank of New York, $5691; check No. 4906 of the National Exchange Bank of Dallas, on the Seaboard National Bank of New York, $5000, and my own check for $469.50. Of the $11616, the amount of the check given me by the clerk for Mrs. Mettler, I deducted $500, that in the calculation made by the clerk he had made me to pay Culberson his entire fee of one thousand dollars, when according to the agreement between the parties I was to pay Culberson $500 and Mrs. Mettler $500. There is still a difference of $44.50 that I remitted; instead of $116 I remitted $160, and after carefully calculating the matter I made it out $160 and I think the clerk made a mistake of $44.50. I remitted what the contract showed was the amount due her and furnished a certified copy of the contract, and she acknowledged receipt of it afterwards as a satisfactory settlement.

507 Q. When did you first hear of the finding of Hunter? About what date?

A. I looked up the date, I think April 28, 1903.

Q. You are not personally acquainted——

A. It was in the Dallas Morning News, whether I am correct in the date or not, the first information I had of Hunter's arrest was an account of it in the Dallas Morning News, I think that will be found——

Q. That was long subsequent to the payment of this money?

A. It was practically a year afterwards; it was after his arrest and at the time of his arrest, had been reported to the Dallas News; I

read my paper at home and saw the account of his arrest, that appeared in the Dallas News. As to the date I won't be positive; it appeared in the News, Morning News; I won't be positive about the date, but I saw the account of his arrest in the Dallas Morning News.

Mr. SPOONTS: What was the character and standing of Senator Gage?

A. No man stood better.

Q. He was a member of the State senate?

A. Yes, sir, as a lawyer and a man no body stood better in Texas.

Q. Was he acquainted with all the parties to the transaction?

A. I understood—he was living there at Pecos, a little village and I understood was intimately acquainted——

Q. What was his information with reference to—expressed to you with reference to whether or not Hunter was drowned?

A. He believed he was drowned.

Mr. LOCKE: Plaintiff objects, on the same ground.

Mr. SPOONTS: Did you hear anything while you were out at Pecos making investigation prior to bringing suit, to lead you to believe that Mrs. Mettler was connected with the conspiracy to defraud the insurance company?

A. Nothing, except as I stated, the only party I met who cast any cloud upon the case was Mr. R. S. Johnson and as soon as I learned the circumstances already stated, I didn't put much credence in his statement about it.

508 Q. Were you personally acquainted with Hunter in his life time?

A. No sir, never met him in my life, up to this time; I saw him while in Dallas but didn't meet him. In addition to the matters already stated, that gave me confidence in the *bona fides* of this case, nothing occurred that convinced me more that it was a meritorious claim than the manner of the defendants' action in the case.

Mr. LOCKE: Plaintiff objects to the statements concerning the manner of defenses as irrelevant, immaterial, and because the good faith of the defendant, Mr. Clark, is not questioned by the plaintiff.

Mr. CLARKE: The first matter that occurred of this character that came within my knowledge was the adjuster of the company's conduct in going to Mrs. Mettler, a widow, without a relative or male to protect her, and told her that he couldn't leave Pecos without letting her know, that notwithstanding he made up proof of death, that he believed and knew the case was a fraud and here brother was not dead, and while having this conversation with her had the telegraph operator to bring him a telegram to her house, which he opened and read and then handed to her, which was to the effect that her brother was arrested and on the way there.

This fraudulent conduct on his part, to my mind, corroborated

the good faith on her part and the bad faith of the insurance company to some extent. After the suit was brought, the defendants' counsel, Messrs. Perkins & Gilbert propounded interrogatories to J. B. Gibson, of Pecos, the district and county clerk out there, and sent them to me to be crossed. I was engaged in a case in the district court at Dallas at the time and about the second day after the crosses had been sent to me, this adjuster, Mr. Milliken called at my office—the office of Alexander, Clark & Hall, then on Commerce street, and stated that he was here to go out to Pecos and make some arrangement for the taking of the depositions already referred to, and that he was pressed for time and if I could cross them right away it would be quite an accommodation to him; I told him I was engaged in the trial of a case, my recollection being this was at noon, but that day after court adjourned I would cross them, and if he would come back to the office about nine o'clock that night, he could get them. He came to the office about nine o'clock
509 at night, and I hadn't finished crossing them, I finished about ten o'clock and gave him the interrogatories and crosses with an agreement waiving commission, so that he could take the early morning train and go to Pecos and employ a notary and have the depositions taken as he said it would be a great accommodation to him. A few days afterwards I learned from Messrs. Perkins & Gilbert that Mr. Milliken, the adjuster didn't wish to return the depositions, or rather take the depositions, and that if I wished to take them I could take them. I wired out there and found out that he had already taken the depositions. I told them if they didn't return these depositions into court that I would file a motion to cause them to be brought into court. A few days afterward I either called at their office or they sent for me, I don't remember which, and they told me, there on the table was the depositions that Mr. Milliken brought from Pecos, there on their desk; that he brought them in and threw them down on the desk and told them they could do what they pleased with them, that he was not going to return them into court. He went out there and employed a notary and took these depositions. He received them from the notary as agent of the company under the statute, which he had a right to do, and it was his duty to return them into court and his conduct in the matter, coupled with his telegram, his fake telegram and the many little minor matters along during the conduct of the case, together with the facts and circumstances and evidence that we had been able to obtain in the case satisfied me it was a meritorious case. During the progress of the case—sometime in 1899, the insurance company employed Mr. John W. Wray, of Fort Worth, to assist Messrs. Perkins & Gilbert in the case. My firm, then Alexander, Clark & Thompson, after consultation decided we should employ Mr. Spoonts to assist us, and as a member of the firm I went over to Fort Worth and took up the matter with him and employed him under the provision of our power of attorney with Mrs. Mettler which authorized us to employ additional councel and provided a fund of $2500 for

that purpose. He had no contractural relationship with Mrs. Mettler whatever, but it was with me and my firm, Alexander Clarke & Thompson, and he—the case was practically pre-
510 pared for trial when Mr. Spoonts was employed with us. It afterwards came up for trial and after taking testimony a couple of days or such a matter, on account of an accident to Judge Meek we had to suspend, and the case went over until the next term. Mr. Spoontz was there and assisted in the partial trial and when at the next term, I think the case came up, he was here and rendered most valuable assistance in the case. In addition to paying Mr. Spoonts $1500 for assisting in the trial of the case I paid Mr. Culberson $500 for his assistance in the Supreme Court. He had no connection with the case except in its presentation in the Supreme Court, I paid $300 for the printing of the record in the Supreme Court & the briefs, I paid Albert Marks, of Nashville, Tenn. $200 for taking testimony there and Mr. Gage having had a good deal of trouble I sent him a check for $200. There was no agreement or contract with reference to Mr. Gage receiving any sum, I just sent him that on account of his having had considerable trouble in the matter. The powers of attorney in the case,—the first one was superseded by the second one. In taking the powers of attorney we did so under the statute of Texas authorizing such contracts for contingent fees and it was our opinion at the time they were such statutory contracts and we still think so.

The contracts of powers of attorney, both of them, were private papers between client and lawyer. During the trial of the case, from its institution until its affirmance by the Supreme Court at Washington, these powers of attorney were never filed in court; they were kept as private papers between client and attorneys. They were made to avoid any misunderstanding between client and attorney in the compensation of fees. When Mr. Finks, the clerk, phoned me on June 3rd, 1902, that the insurance company had paid off Mrs. Mettler's judgment, I took the powers of attorney and carried them up there and filed them with him as evidence of my authority to act in the matter as attorney. He collected the amount of the judgment from the insurance company for Mrs. Mettler and I received from him the checks I have already stated as her attorney, and remitted the money to her, as already stated. After the institution of the suit in Ohio against Mrs. Mettler she wrote me that they sued her up there and
511 *and* supposed they had or would down here and that she wanted me to defend her, that she expected me to defend her, having been her attorney to obtain the judgment, she expected me to defend her. I wrote her that I represented her in good faith during the years I was her attorney and before I would represent her any further she must satisfy me with reference to whether she had divided the money I sent her with her brother; that I understood her brother had been arrested in Alabama, and told her that I had remitted her New York exchange and she collected it through

some bank and had checked it out, and if she didn't have the checks to show she could get them and to please do so and send them to me, so I could see what she had done with this money. She sent me these checks and I have misplaced the checks and I cannot find them high nor low; I have made diligent search high and low for them and cannot find them; but I have a very good recollection of them and I can state that they are practically—to my knowledge they are practically the checks stated in the deposition of Mr. Wilson, the banker. The exhibit correctly states the checks, and I have searched for them and cannot find them having lost or misplaced them.

Cross-examined by Mr. LOCKE:

Q. At the time you had your first conference with Mrs. Mettler, it was stated to you that the company denied that her brother was dead?

A. Yes sir.

Q. During the negotiations for a compromise that you have detailed in your direct examination, what was the position taken by the insurance company?

A. All the time, the question was whether or not Hunter was dead.

Q. You understood during the entire progress of the claim or litigation on the claim, that the company denied that Hunter was dead?

A. Yes, very bitterly.

Q. When you negotiated with Senator Culberson for his
512 assistance in presenting the case in the Supreme Court, did you apprise him of the nature of the litigation and the issue involved?

A. Yes sir.

Q. Did he know at the time he made his contract with yourself, and Mrs. Mettler that the company denied that Hunter was dead?

A. He did, that was really the only issue in the case, other than the constitutionality of the Texas statute allowing reasonable attorney's fees and twelve per cent. damages.

Q. At the time you had the negotiations described with the Phillip Investment Company, what information did you give that company with regard to the nature of the judgment that you proposed assigning as collateral security?

A. My negotiations were with Mr. Young, a representative down here from Kansas City and I don't think I went into any details about the case whatever with him; we discussed the matter of my indebtedness; he had an idea of the value of the property I was offering him; I tried to get him to take the property for the debt; we at last agreed on a settlement, and he asked me if I could give him security for that note and I told him I had a judgment in the Federal court in a case I had a contingent fee of about eight thou-

sand dollars and I could give him that if it would do him any good, and he said all right. I don't think we discussed the case at all, then.

Q. He took it without knowing what the litigation was about?

A. My recollection is he did.

Q. What influence, if any, did the giving of that security have upon Mr. Young in extending the time for payment of the $1470.

A. I think the security had no influence on him.

Q. You had made that agreement already, and you gave him that security as lagniappe?

A. No sir, we had made no agreement; this security was part of the transaction, and before he had agreed to take the note, he had asked me about the security and I told him I had no security
513 other than these nine lots out there and my home, and then I told him I had a contingent fee in this case, a fee of about eight thousand dollars, and I thought it would be affirmed, and he said all right, and he got up the transfer of it and the note and closed the matter.

Q. Who prepared that transfer?

A. I don't remember.

Q. Who was advising with him——

A. I think I did, but I will not be positive.

Q. Who was advising and acting as agent and attorney?

A. He and I. Alexander & Clark, his attorneys and I had transacted business for the company and knew him intimately.

Q. Do you know whether or not he had a conversation with either Mr. Alexander of Mr. Thompson in regard to the nature of his judgment.

A. I don't know.

Q. To whom did you deliver the transfer when you made it?

A. I think to Mr. Young, I won't be positive about that.

Q. Do you remember who took the acknowledgment?

A. Mr. Mansfield, W. H. Mansfield.

Q. Who was Mr. Mansfield?

A. He was stenographer for Alexander & Thompson.

WM. H. CLERK.

I do further certify that the testimony so given by the said witness William H. Clark was reduced to typewriting by me as the same appears at large above, and afterwards was read over by the said witness and was signed by the said witness, and in — that of such of the parties or coun sel as were in attendance, the genuine signature of the witness appearing above.

Thereupon, the respondents called as a witness W. M. ALEXANDER, who having been by me carefully examined and duly sworn to testify the truth, the whole truth and nothing but the truth in said cause, was questioned orally by counsel and gave answers and testimony as follows:

514 Testimony of the Witness Wm. M. Alexander.

Direct examination by Mr. CLARK:

Q. What is your name?
A. W. M. Alexander.
Q. Where do you reside?
A. Dallas.
Q. What is your profession?
A. Practicing attorney.
Q. How long have you been practicing, and where?
A. Been practicing at Dallas continuously since 1885.
Q. In 1896 and 1897, what was your firm?
A. The firm during 1896–7 was Alexander, Clark & Hall.
Q. How long had that firm been existing at that time?
A. I think since 1892.
Q. How long did it exist?
A. Until about the first of January 1898, is my recollection.
Q. What was your firm before that?
A. Alexander & Clark.
Q. How long had that existed?
A. I think since 1887.
Q. Who filed this suit here spoken of, of Mrs. Mettler against the insurance company in the State court?
A. I am pretty sure I drew the original petition, but as to who filed it I cannot say. It was dictated by myself I am pretty sure; I have a pretty distinct recollection.
Q. State whether during the number of years this cause was pending in the Federal court at Dallas you and your partners W. H. Clark and W. L. Hall had numerous conferences with Mrs. Mettler the plaintiff.
A. Yes, we did.
Q. From the time of the filing and before it was filed, up to the time of the dissolution of the firm of Alexander, Clark & Thompson? When was that?
A. I think that was about 1899, December I think.

515 Q. January 1st.
A. I think so, along about that time?
A. After the dissolution of Alexander, Clark & Thompson, to whom was this case assigned?
A. It went to W. H. Clark, in the division of the business.
Q. After the dissolution of my firm, what was my firm after that?
A. I think with the exception of a short time you practiced alone; it was Henry Clark & Henry?

Q. Judge John L. Henry and his son?
A. Yes.
Q. What was he judge of?
A. He was associate justice of the supreme court of Texas for a number of years.
Q. The junior Henry was his son?
A. Yes sir, subsequently city attorney.
Q. Up to that time, you were present and engaged in conversation with Mrs. Mettler; state whether or not, Mr. Alexander, during the time of your active connection with the case, from 1897 to 1899, you ever saw or heard or observed anything on the part of Mrs. Mettler or any one else that caused you to suspect or doubt her good faith in the matter of prosecuting her case?
A. I never, I think we all regarded it as a case resting upon circumstantial evidence and from conversations with her and with the various witnesses we were impressed especially with the good faith of the plaintiff in that suit.
Q. Did you ever know or meet her brother, W. A. Hunter?
A. I never did?
Q. Up to this time?
A. I never saw him at any time to know him.
Mr. SPOONTS: Mr. Alexander, are you not mistaken about the date that Alexander Clark & Thompson dissolved?
A. I may be.
516 Q. Here is a letter dated June — 1899?
A. That was signed by Mr. Mansfield; I recognize his signature, and this letter satisfies me that the firm of Alexander, Clark & Thompson was in existence June 3, 1899, I am giving it approximately, the firm was dissolved during that year, during the year 1899 instead of January.
Mr. SPOONTS: I know that when I was negotiating with Mr. Clark the firm was together.
A. I will state that I expect the firm of Alexander Clark & Hall was dissolved probably in the fall of 1898 and the firm of Alexander, Clark & Thompson in the fall or winter of 1899, about a year subsequent.
—. Mr. Clark state what connection, if any, you had with the settlement between me and the Phillips Investment Company.
A. I had nothing to do with the settlement between you and the Phillips Investment Company.
Q. Who negotiated that settlement?
A. Mr. Young.
Q. With whom?
A. With you, I will state that Mr. Young's company had been a client of Alexander Clark & Hall and of Alexander, Clark & Thompson and Mr. Clark was on the same terms with the members and managers of that company as I was and in the settlement of his business relations, I think he represented himself, and Mr. Young who was a good business man, represented the company.

Q. Who filed that transfer in the court?

A. I don't know as to that; it is quite likely that Mr. Young had Mr. Mansfield; it is quite likely that Mr. Young dictated the papers; he was a man that was very conversant with forms, and as to who filed it I don't know, if I was going to the Federal court, or had been going to the Federal court and my attention was called to it I probably filed it, I don't know who filed it; I have a pretty distinct recollection of looking through the papers here recently, and I think it is on our stationary, and my inference would be that the instruments were prepared in our office.

517 Q. Didn't you understand from me since the filing of that instrumen- that it was not to be filed?

A. I have understood that.

Q. If you had known such was the understanding you would not under any circumstances have filed it?

A. Not without calling your attention to it and having it satisfactory. If I had been consulted, I would certainly have seen you with reference to it.

Cross-examined by Mr. LOCKE:

Q. You say the transfer from Mr. Clark to the Phillips Investment Company is on the stationery of Alexander, Clark & Thompson?

A. I think it is, I think I have examined the papers since the institution of this suit.

Q. Have you any recollection of having prepared it yourself?

A. No sir, I have certainly no recollection of it, and on the contrary I have a distinct recollection that I would not appear in any position antagonistic to Mr. Clark.

Q. Do you know whether Mr. Thompson dictated the instrument?

A. I don't believe Mr. Thompson is acquainted with Mr. Yound and never met him. Mr. Thompson never gave any consideration whatever to the business of the Phillips Investment Company during our connection with it; our practice was largely insurance litigation, and he never had the time to give any attention to the branch of the business.

Q. Was there any one connected with your office that would have drawn the instrument?

A. No sir.

Q. Your suspicion is that Mr. Young dictated it to your stenographer.

A. Yes, he often did that, he used our stenographer, he would visit Dallas about once a year; they had out considerable loans in Texas, and he would visit our office about once a year and he was welcome to use our stenographer and make himself at home generally around the office.

518 Q. So far as you know that is the way the instrument was prepared?

A. Yes, sir, so far as I know.

Q. Do you know whether Mr. Young had spoken to you about the matter of this judgment before it was transferred?

A. I don't think Mr. Locke, that Mr. Young had any further conversation with me than to tell me that he had settled with Mr. Clark, at the time; subsequently I understood—at this time I cannot recall from whom I understood—whether from Mr. Clark or from Mr. Young, that he had an assignment of an interest in the Mettler judgment.

Q. When the clerk paid to the Phillips Investment Company the amount represented by its interest in the judgment, who acted for the company?

A. In what respect do you mean?

A. In collecting from the clerk their interest in the judgment?

A. I think we did that; my recollection is Mr. Finks called my attention to the—I believe Federal court was in session, my recollection is I met Mr. Finks and my attention was called to the fact that the judgment had been paid and he asked me with reference to the Phillips Investment Company: I don't know whether he got his information from Mr. Clark, or how. I had been advised that the amount would be disbursed upon the sending of the note, or something of that kind and the note was sent to us with a form of receipt that the clerk prepared; they sent the note to us, my recollection is that I presented the note to the clerk and he paid it without waiting for the return of the receipt. I know the receipt he prepared, formal receipt, was not returned, because I found it in my office the other day among the papers, I made a little search before I came down here. I will state that we represented the Phillips Investment Company on a salary up to about the year 1897, and their business had let up to such an extent that they put us on a fee basis, and we have no charge—while I knew it was a fact, to make more sure, to make more certain I have examined our ledger account and talked with our stenographer, and I know we
519 never collected one cent, and never acted in this case as attorney for the Phillips Investment Company. that is, paid attorney; we acted no more for them than we did for Mr. Clark; if we took any action it was such action as you would be likely to call on a friend. I know I never discussed the question of the character of the judgment with Mr. Young.

W. M. ALEXANDER.

I do further certify that the testimony so given by the said witness W. M. Alexander, was reduced to typewriting by me, as the same appears at large above, and afterwards was read over by the said witness and was signed by the said witness in my presence, and in that of such of the parties of counsel as were in attendance, the genuine signature of the witness appearing above.

It was agreed by counsel, subject to all legal objections, that W. L. Hall, of Dallas, Texas, of the law firm of Alexander, Clark & Hall, was actively connected with the case of Mrs. Mettler against the in-

surance company from its institution until sometime its trial in the Federal court at Dallas. During this period he had frequent conversations with her and consultation with his partners with reference to the case and never noticed or observed anything from Mrs. Mettler or any other party, which caused him to doubt her good faith in the prosecution of her claim and suit. That on the other hand he believed that she was acting in good faith and that her brother was drowned. That before the institution of this suit and after the institution of this suit Mr. Hall endeavored to settle or compromise the suit with the attorneys for the insurance company, offering to take one half of the amount of the policies and give the company a good surety company indemnity bond to the effect that if Hunter was not drowned and turned up within seven years that the company should be paid back said seventy-five hundred dollars, together with six per cent. interest thereon.

520 That said Hall and his partner W. H. Clark had arranged this proposition with Mrs. Mettler hoping to obtain a settlement, it being agreed that the principal sum of $7500 should be invested in some good real estate investment in Dallas, bearing an income and that through said period of seven years only the income should be used.

It is agreed that except so much of the above and foregoing statement relates to the good faith of Alexander, Clark & Thompson, shall be deemed the testimony of W. L. Hall.

I do further certify that I have retained in my possession until this moment the foregoing depositions of the witnesses M. A. Spoonts Wm. H. Clark, and William M. Alexander, and that I am now delivering the same to the clerk of the United States circuit court for the northern district of Texas, at Dallas.

In testimony of which I have hereunto set my hand, at Dallas Texas this January 12 A. D. 1905.

GEO. W. PARKER,
Special Examiner.

My fees for taking the foregoing depositions are $19.50.

GEO. W. PARKER,
Special Examiner.

Endorsed as follows: No. 597 equity, The Fidelity Mutual Life Insurance Company *vs.* Jennie M. Smythe *et al.*, Testimony of the witness- M. A. Spoonts W. M. Alexander, and Wm. H. Clark. Received from the hands of G. W. Parker, this January 12, 1905 and filed same Jan'y 12, 1905, J. H. Finks, clerk.

521 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants. } In Equity. No. 597.

Deposition of witness taken before me, Charles C. Cooper, special examiner, duly appointed by an order made in chambers by the Honorable D. E. Bryant, United States district judge, August 8, 1904, in the case of The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.*, pending in the circuit court of the United States for the northern district of Texas, at Dallas, Texas, taken at my office at the court house, in Newark, Licking county, Ohio, on the 23rd day of January, A. D. 1905, to be read in evidence on behalf of the defendants, B. G. Smythe, Esq., being present on behalf of defanden- and Judge Charles H. Kibler on behalf of plaintiff.

JENNIE M. SMYTHE, being by me first duly cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Jennie M. Smythe.

Direct examination.

Examined by B. G. SMYTHE, Esq.:

Q. State ypour name, age, residence and occupation.

A. My name is Jennie M. Smythe; age somewheres about 40; residnece, Newark, Ohio, Elmwood avenue, No. 342; Licking county.

Q. Are you married or single?

A. I am married.

Q. How long have you been married to your present husband? And what is his name?

A. Almost two years; his name is James M. Smythe.

522 Q. When did you take up your residence in Texas?

A. In 1886.

Q. With whom did you reside there?

A. With my husband.

Q. Did you reside at any time with your brother, William A. Hunter—are those his initials?

A. Yes, sir; he lived with me part of the time; at my home.

Q. He lived with you?

A. Yes, sir.

Q. What portion of the time did he live with you?

A. Well, at different times; all the time that he was there. At different times during the time that I lived in Texas.

Q. Did your husband die while he lived in Texas? And if so, when did he die?

A. He died in 1896, in Texas.

Q. Where in Texas did you make your home after that?

A. At Pecos city for a while.

Q. When did you first learn that your brother was insured in the plaintiff company?

A. It was after his disappearance or death, along in January—the first of January, sometime, in 1897.

Q. State how you received this information. And what occurred in reference to the policies of insurance.

A. Through Mr. Gage. I went to see Mr. Gage about a note that I found among my brother's effects, and I went for advice as to how to collect that money; as to what I should do, or how I could get it, and he advised me about the note; that it was a small matter and it wasn't any use of appointing an administrator; and then he says: by the way: Your brother left a package with me in the bank, and he brought that package and brought it to me—got it and brought it to me, and he opened it; it was wrapped up in heavy paper or something of that kind, and it proved to be insurance policies, and that was the first that I had ever known that he had his life insured.

Q. What, if anything, do you know about the preparation
523 of a notice of the death?

A. Well, I asked Mr. Gage what I should do, and he told me to write the company about it; and I says: I don't know how. What will I say? And he says: Well, here, and he blocked me out a little—what would you call it? Something to go by, anyhow, and he told me to copy that and send it, and I did so.

Q. What, if anything, occurred in the way of a response to that notice on behalf of the plaintiff company?

A. There was a man came to my house where I lived, and he said his name was Milligan, and that the insurance company had sent him up there to make up the proofs of death of W. A. Hunter.

Q. And what occurred at that time between you and Milligan?

A. I helped him; and he worked all day on them, and he said in the evening that they were satisfactory, and that he would send them in that night. And the next morning he came back, and on another day still; asking questions; and I think he worked two or three days with those. And I thought he had asked about questions enough and I went to see Mr. Gage about it again, and I told him what the man was doing, and at one time he told me to answer his questions; and he kept ahead asking questions and coming with more papers and I went again to Mr. Gage and Mr. Gage told me

he wouldn't bother any more about him at all; that he didn't know what kind of a man he was, or what he was up to.

Q. What further occurred between you and Milligan, if anything?

A. Then he came to my house in the afternoon and insisted on me bringing the policies up to the house. He had already seen them at the bank. I left them at the bank; and he wanted me to bring them to the house, and he would look them over, and I refused to do it, but he insisted that I should have them there the next morning, and he would come up and see them. And the next morning he came, and while he was sitting there talking—it was a cool morning, and I was sitting on one side of the stove and he was sitting on the other side, and some one came to the door and handed in a telegram, and he opened the telegram; it was for him; and he read it and looked at it a little bit and handed it across the stove to me, and he says: What do you think of that? I can not remember exactly what it was it said, but it was something like this: We have brother under arrest and will be in tonight. That is as near as I can remember it; something like that. That was the sum and substance of it at least. *stance of it at least.* And, now, he says: Will you give up the policies? And I says: I don't believe it. And he jumped up and came around in front of me, and just stood over me with his fist doubled up like he was going to strike me, and I thought he was and jumped around the other side of the stove, and he says: Now, will you give up the policies? And I don't remember the conversation that followed that, but there wasn't very much of it, because I was frightened. I told him to leave the house, and he came back after dinner again—or, right while I was eating dinner, is when it was, and I went to the door and he wanted to speak to me, and I said: No, I had nothing more to say to him, and he insisted that I had better listen to him, and I said: No, I wouldn't; and never speak to me again; and I shut the door in his face, and I haven't spoken to him from that day to this.

524

Q. In either of those conversations, was there anything said on the subject of prosecution against you or your brother?

A. Yes, sir, he said if I would give up those policies, that there would be no prosecution; that he would save me and my brother a lot of trouble and probably from the penitentiary.

Q. In what conversation did that occur?

A. I think it was when the telegram came. It was either then or the evening before. It was when we were talking about the policies; about giving them up.

Q. Do you know one Andrew J. Brown?

A. I know of him. He was the State agent at Dallas. I am not particularly acquainted with the man.

Q. He is State agent for what?

A. For the Fidelity Mutual Insurance Company.

Q. Do you know what relations existed between your brother and this man Brown, prior to the time that your brother disappeared?

A. Only from what Mr. Brown himself said——

By Judge CHARLES H. KIBLER: I object to what he said.

A. That is all I know about that.
Q. Go ahead and state it.

Objected to by counsel for plaintiff.

A. Mr. Brown said that he and my brother had been friends
525 and had been acquaintances for a number of years.
Q. State whether you had any knowledge whatever that your brother intended to insure his life.
A. I had none at all.
Q. Was there any conversation or understanding at any time between your brother and yourself on the subject of having his life insured?
A. Not any.
Q. Do you know Able Wilson of Utica? Utica, Ohio.
A. I do, yes, sir.
Q. State whether you ever deposited with him or the bank with which he is connected any draft or exchange.
A. I did.
Q. State when the deposit was made. And the amount of the deposit.
A. It was about July 2, 1902, I think.
Q. What was the amount of it?
A. It was $11,162.25.
Q. Where did you get it?
A. It was sent to me in drafts and checks from William H. Clark, of Dallas, Texas.
Q. What relation existed between you and did exist between you and William H. Clark?
A. William H. Clark was my attorney in the case against the Fidelity Mutual Life Insurance Company.
Q. Where was this money on the 29th day of April, 1903?
A. It was in the bank—what I hadn't taken out.
Q. Are you able to state the several amounts which were withdrawn from the bank prior to April 29, 1903?
A. Do you want me to commence with the beginning of the checks, or anything of that kind?
526 Q. Yes, if you can do it. Can you do it without a memorandum?
A. I don't think I could. I would rather have a memorandum.

(Mr. Smythe hands the witness a paper.)

By Judge KIBLER: What memorandum is that?
By Mr. SMYTHE: It is a memorandum to refresh her recollection.
By Judge KIBLER: It is not a memorandum that she made?
The WITNESS: No, sir.

By Judge KIBLER: The bank book would show that better.
The WITNESS: Well I guess I can give them without that. (Hands back paper to Mr. Smythe.) The first check was $8.00.

Q. Do you remember the date of that?
A. I cannot give the dates of them.
Q. Was that on July 26, 1902?
A. It was about that time. That check was for a berth in a sleeper for myself and sister.
Q. Do you recall the next one?
A. The next one was $185.00—I may not get the amount exactly right.
Q. Well do the best you can.
A. That, I think, is what it was—$185. That was a check for my father to draw it, and that was for money to purchase our tickets when my sister and I started west on a trip.
Q. Do you remember the date of that check? Was it August 2, 1902, or about that time?
A. That was about the time, for I think we started on the excursion on the 3rd, and that was the day before that time.
Q. What is the next?
A. The next check was $300 and some—three hundred and some dollars; three hundred and seventy-four, I believe, or something like that, to my father. I loaned him some of it, and part of
527 it was for myself, for my own use. I got part of it for myself and loaned him the balance of it.
Q. Was that the same date?
A. I think that was the same date am not sure. It was either then or the next day.
Q. And what was the next one?
A. I think the next one was $100 that I drew in Denver.
Q. Do you remember to whom that was drawn?
A. R. R. Munn. That was for my expenses.
Q. Was that of date August 15th?
A. It was along about that time; we were on our trip.
Q. And what next?
A. And the next was $75, in Dallas.
By Judge KIBLER: $74?
A. No, sir, it was $75.
Q. Was that Sep. 6?
A. That was along about that time. And then I drew another check at Fort Worth for $20; that was for my expenses.
Q. And what about the date of that? Well, was that Sep. 29?
A. It was along about that time. Because I wasn't there very long.
Q. Well, what next?
A. And the next check was for $700 I believe. That was the next check.
Q. In whose name was that drawn?

A. C. R. Hunter.
Q. And what was the nature of that transaction?
A. That was to purchase some cattle with.
Q In what sort of a venture?
A. Sir?
Q. Under what sort of an arrangement?
528 A. My brother in Oklahoma, C. R. Hunter, had cattle; he was a ranchman on a small scale, and he was to purchase those cattle for me and take care of them.
Q. And what was the result of that investment?
A. The result was a failure. The cattle died from disease, and otherwise—then the decline in the price, and in figuring up my expenses, in getting them, and the care they had through the drought, to get water, and the expense of going out there this last fall to look after them, or to see to the selling of what was left of them, ate it all up. And so that was a failure.
Q. And what next occurs to you in the way of a draft or check?
A. I didn't draw any more until I got home. The next was to my brother, C. E. Hunter, I think for $75.
Q. Was that about October 15?
A. That was along about that time, yes, sir.
Q. What next occurs to you?
A. The next check I think was $1890. to W. S. Weiant.
Q. Do you remember the date of that? Was that about October 25?
A. That was in October, yes, sir; along the last of October.
Q. What next occurs to you?
A. There was $5. to Dr. McCann for dental work.
Q. Was that about February 10, 1903?
A. Yes, sir, it was in February.
Q. What else do you remember?
A. Well I have left out two other checks——
Q. It doesn't matter about the order.
A. There was one check for $100. to my brother, C. E. Hunter—Dr. C. E. Hunter.
Q. Was that about Dec. 2, 1902?
A. Yes, sir, that was along in Dec. And there was another check to him of $100. That must have been along about Feb. I
529 would think.
Q. And was that in 1903?
A. In 1903, yes, sir.
Q. About January 28?
A. It might have been the later part of January, or the first of February, or somewheres along there. I don't remember exactly. And there was another check for $540.
Q. And what next?
A. That, I think, was all the checks up to the time I drew it all out—the last check.
Q. And what was the amount of that?

A. $7134.

Q. And that was about what date? Was that about April 30, 1903?

A. That was April 30, yes, sir, 1903.

Q. State whether you had any other moneys on deposit in the Wilson bank other than that which was received from William H. Clark?

A. I had no other. I deposited some afterwards, but it was money that my father paid on his note; he paid his note. I deposited that in the bank after he paid that.

Q. And what was the amount of that?

A. $145 and some cents, probably.

Q. I will ask you whether William H. Hunter, your brother, prior to April 29, 1903, got any portion of that money which was received from William H. Clark by you?

A. Not ant at all.

Q. Or, whether you had promised him any, or agreed to pay him any part of it?

A. I had never promised him any, or agreed to pay him any.

Q. When did you receive information first of the alleged arrest of your brother?

A. It was the 29th of April, 1903. It was in one of the 530 Newark papers.

Q. What paper did you see it in?

A. I saw it in the Tribune.

Q. State whether this is the paper you have reference to, (hands paper to witness).

A. Yes, sir, that is the one.

Q. State to the examiner how the article to which you refer is headed—the headlines.

A. It is: "Pursued by insurance companies for years; man arrested in Birmingham thought to be a former resident of Homer."

Q. And what is the date of the paper?

A. April 29, 1903.

By Mr. SMYTHE: I wish to attach that as part of the deposition of the witness.

By Judge KIBLER: Do you wish to attach the whole paper?

By Mr. SMYTHE: Well, I don't know, I expect so.

(Said paper above referred to is hereto attached, marked Exhibit "A" C. C. C., and made a part of this deposition.)

(A true copy of the article referred to, made part hereof, is as follows:

"Pursued by Insurance Companies for Years.

"Man Arrested in Birmingham Thought to be a Former Resident of Homer.

"A dispatch from Birmingham, Ala., in the Cincinnati Enquirer, relative to the arrest of a man named Wm. A. Hunter, alias Wm.

Hunt, on the charge of swindling and obtaining an insurance policy with intent to defraud, revives the story of the sudden disappearance of Wm. A. Hunter, a former resident of Homer, and whose father, W. A. Hunter, is a resident now of this city, while he has a brother, Dr. R. A. Hunter, and a sister, Mrs. J. M. Smythe, also of Newark.

"Along in the '80's Wm. A. Hunter, Jr., left home in search of his fortune, going from here to Texas. He was home in 1888,
531 when his mother died, to attend the funeral. He then returned to his home in Loving county, Texas. In 1896 he took out a life insurance policy for $15,000 made payable to his sister, now Mrs. Smythe. In 1897, he suddenly disappeared and a body was found on the banks of the Pecos river in Texas, which was identified his. The news of his death was sent to his family in Homer, and his sister made application for the insurance money, which was refused by the company, the Fidelity Mutual Life Insurance Company, as it is believed it had reasons to doubt the genuineness of Hunter's death.

"A hard legal battle followed and the case was carried through the courts but was finally won by the sister, of Hunter, and the money paid over to her.

"Since then, at various times, it is said, the story has been told that Hunter has been seen here and there, and the insurance company has been quietly, but none the less carefully, looking after every clue which might lead to the arrest of the man suspected to be the missing Hunter, and no place is left unguarded whereby he might possibly escape. It looks by the following dispatch as though he had been caught.

"Dr. Hunter was called upon by an American Tribune representative this afternoon in reference to the matter but he could say but little about it, as he was quite young when his brother left home, and he only remembers the story of his brother's death and that his sister received the money.

"Mrs. Smythe is in Homer at present and could not be seen by the reporter.

"The story will be quite interesting to Licking County people, as the Hunters are well known in and about Homer, and stand high in the estimation of their neighbors.

"The insurance company is the one represented by W. V. Jordon, and has quite a number of policies written here.

"The telegram is as follows:

532 "Birmingham, Ala., April 29.—William A. Hunt, or Wm. A. Hunter, who is alleged to have disappeared on the banks of the Pecos river, in Loving county, Texas, in December, 1896, and whose heirs are said to have obtained judgment for $15,000. on an insurance policy on his life, together with heavy damages, was arrested about noon today at Birmingham, and is now in the county jail.

"The warrant charges that William A. Hunter, alias Wm. Hunt, is a fugitive from the justice of *rom* Reeves county, Texas, on the charg

of swindling and obtaining an insurance policy with intent to defraud the Fidelity Mutual Life Insurance Company, of Philadelphia."

Q. Do you know one Mrs. R. S. Johnson?
A. Of Pecos?
Q. Yes.
A. Yes, sir, I do.
Q. Texas?
A. Yes, sir.
Q. State whether you told Mrs. Johnson, in October, 1896, that these policies in controversy had been issued.
A. How is that?
Q. State whether you told Mrs. Johnson, in October, 1896, that these policies in controversy had been issued.
A. No, sir; I didn't.
Q. What, if anything, do you know of a registered letter in the post office box, about January 2, 1897?
A. I don't know anything about any.
Q. How is that?
A. I don't know anything about any. In whose box?
Q. How?
A. In a box.
Q. Did you have any knowledge at all of it? A registered letter.
533 A. I don't remember anything about a registered letter.
Q. Being in R. S. Johnson's box, I believe in the name of the man.
A. If there were any registered letters in R. S. Johnson's box, they are there yet, for I don't know anything about them.
Q. Prior to the time that you left Pecos—well, when was that? The date.
A. That was about the 3rd or 4th of December; it was either the 3rd or 4th of December.
Q. Well I just want to know so I can frame the question.
A. Either the 3rd or 4th of December, 1896.
Q. Prior to your brother's disappearance from Pecos, on the 3rd or 4th of December—did you say?
A. Yes.
Q. On the 3rd or 4th of December, 1896, what do you know, if anything, about any interests he had in Loving county, Texas?
A. He had a section of land that was ready to prove up on. That is, he had lived on it the time required by the State, and he still had his interests in the Loving County Canal & Investment Company, the irrigation company.
Q. Do you know what improvements were made by him, or were attempted to be made by him in Loving county?
A. That is what he started to do—was to make some improvements on that.

By Judge KIBLER: Well, you, of course, are not expected to state what he said to you.

By Mr. SMYTHE: Read that question.

The EXAMINER (reading): "Q. Do you know what improvements were made or attempted to be made by him in Loving county?"

Q. Or what attempts at farming he made.

A. I know what was done. It was just experimental farming, to see what would grow there.

534 Q. Well, state what he did.

A. Well, he had raised just garden truck—corn and potatoes, and cabbage, and beans and such things; and melons.

Q. On the day that your brother went away, state whether you saw him.

A. I saw him on the morning he started.

By Judge KIBLER: What did you say?

A. I saw him; he left me when he was just ready to start.

Q. Where?

A. Where I was living in Pecos.

Q. What occurred, if anything, between you at that time?

By Judge KIBLER: I object.

A. Well, there wasn't anything, only he just got in his wagon and drove off.

Q. Before he got in his wagon and drove off, were you in a room upstairs in the house with him?

A. No, sir.

Q. State whether you were in a room upstairs in that house and remained with him 2 hours.

A. The day before he went away, he was gathering up some things to take along with him, and I had some goods stored in a house about a mile from town, and we went out to that place and went upstairs and selected the *the* things that he wanted to take along with him. Some bedding and provisions and canned goods that I had; and he selected those things to take with him. I don't know how long we were there or anything about that, but we were there long enough to gather up the things that he wanted to take with him.

Q. Were you upstairs with him on that occasion for any other purpose——

A. Not for anything else.

Q. Other than what you have stated.

A. Nothing. That is what we went for.

535 Q. In what house did that occur?

A. Mrs. Manning was living in the house; the house belonged to Mr. Powers.

Q. State whether a bundle of papers came into your possession from W. H. Clark, in his office in Dallas, on your return trip from the City of Mexico?

A. I got a package from Mr. Clark after I returned home.

Q. What did that package consist of?

A. Some old deeds and papers belonging to the Loving County Irrigation Company, and some family pictures, and papers that were used on the trial of the case.

Q. Will you please state why you brought you- suit against the plaintiff at Dallas, Texas?

A. On the advice of my attorney, Mr. Gage; there was no agent at Pecos, and he advised me to bring it in Dallas—in the court there; and advised me to employ and gave me a letter of introduction — Alexander, Clark & Hall—it was then.

Q. And when was that, Mrs. Smythe?

A. That was in the spring, in 1897.

Q. What, if anything, do you know of the county script or warrants which belonged to your brother?

A. There were some pieces of county script—about six hundred dollars, as near as I can remember.

Q. Do you know whether the county warrants or scripts were of any value?

A. None at all; the county was disorganized.

Q. And what was the amount of that note that you spoke of, on your first visit to Mr. Gage?

A. I don't remember the exact amount of it. It was $270, or something like that; and there had been some payments made on it. I don't remember how much they were.

Q. And state about the amount that was collected.

536 A. And I collected about $100. In little amounts, at a time; about $10. at a time on the note.

Q. After the commencement of your case against the plaintiff company in Texas, state whether there was any effort on your part to hurry the case to trial.

A. No, sir.

Q. Or, what, if anything, occurred on that subject.

A. I never did anything to hurry it to trial. They had all the time they wanted. I didn't do anything to hurry it.

Q. State on which one of the visits that you made to Mr. Gage the policies were found.

A. That was the first time I went to see him. That was the time when I went to ask him about the note; about what I should do with the note.

Q. Has your brother, to your knowledge, received any benefit whatever from the money which you had received from the suit in Dallas against the plaintiff?

A. None that I know of.

Q. Had you given him any property or anything of value for or on account of that money?

A. Nothing whatever.

Q. Or, had you directed any one else to do so?

A. No, sir; I hadn't.

Q. Did your attorneys pay him any part of the money before it came into your hands that you have any knowledge of?
A. No, sir, not that I know of.
Q. Or was any such a thing done by your attorney?
A. No, sir; it wasn't done by my attorney.

By Mr. SMYTHE: You may inquire.

537 On cross-examination, said witness testified as follows:

Cross-examination.

Examined by Hon. CHARLES H. KIBLER:

Q. Give the full name, if you can, of the man who came to you as you say—the same man who produced that telegram.
A. I don't know his full name; only his initials. R. C. Milligan.
Q. R. C. Milligan?
A. Yes, sir.
Q. Had you known him before?
A. I had never seen him before.
Q. Do you know where he lived?
A. He told me that his home was in Augusta, Georgia.
Q. You saw this notice in the newspaper—in the Newark newspaper that you referred to on the 29th day of April, 1903.
A. That is the paper, yes, sir.
Q. Well, that is not an answer to the question. Read it.

The EXAMINER (reading): "Q. You saw this notice in the newspaper—in the Newark newspaper that you referred to on the 29th of April, 1903."

A. In the Newark paper. That is what you asked me, isn't it?
Q. What was the date?
A. The 29th of April.
Q. And the next day afterwards, you went to Wilson's bank, and withdrew the balance of the money.
A. Yes, sir.
Q. Why did you do that?
A. From the account that was in the paper. It said that one W. A. Hunter, was arrested, and I didn't believe it, but still I thought it was just like some of their other games; that there was something crooked about it, and I thought the best thing for me to do was to go and take it out of the bank.
538 Q. What did you do with the money that you got out of the bank?
A. What money do you mean?
Q. The seven thousand and odd dollars.
A. I decline to answer.
Q. What did you say?
A. I decline to answer that.
Q. I insist upon an answer.

A. And I still decline.

Q. What have you done with the papers that were in the package that you say you received from Mr. Clark?

A. I think part of them are around my house, if I haven't destroyed them. I have the pictures still.

Q. Well, other than the pictures, have you those papers?

A. I have a part of them, I know. There were some of the bonds—no, not bonds, but certificates of the irrigation company—I have some of those, I know.

Q. You said there were deeds there.

A. Deeds of this Pecos Valley land in Loving county.

Q. Anything else that you remember of?

A. That is about all there was in it. Just that Loving County matter.

Q. In what year or years, or for how long at a time, did you reside at Mentone in Loving county, Texas?

A. I was there only a short time.

Q. The question was: In what year or years?

A. Well, I went in the fall of 1895—the last of October or the first of October—the last of October, I think it was, and was there until in April, in 1896.

Q. And that was all the time that you resided there, was it?

A. That is all the time that I lived in Loving county, yes, sir.

Q. When and where did your former husband, Mr. Metler, die?

539 A. He died in Mentone, Loving county.

Q. When?

A. In March, 1896. In Mentone, Loving county.

Q. In March, 1896?

A. Yes, sir.

Q. When did you go to Pecos city to reside, and how long did that continue to be your place of residence? When did you go to Pecos city, Texas, to reside?

A. I went in April.

Q. In April?

A. Yes, sir; I went from Mentone to Pecos.

Q. In April, 1896?

A. Yes, sir.

Q. And how long did that continue to be your place of residence?

A. I didn't live there all the time, but at times I was away from there. I stayed part of the time away from there, but I was there during 1896, and part of the time in 1897. I don't think I was there only just in those two years. I went away and didn't intend to go back, and I took a notion to go back again.

Q. In what houses or with what families did you reside and board during the time of your stay at Pecos city? Give them all.

A. When I first went there to Pecos, I stayed in Mr. Powers' family.

Q. For how long did you stay there?

A. Well from April, the time that I went there, up until sometime in August, I don't remember the date. Sometime in August.

Q. Then where did you go?

A. Then I went to live with Mrs. Heitman in Pecos, Texas.

Q. How long did you stay there?

A. I was there that winter and all the next summer. Mrs. Heitman and I were together that winter and all the next summer; I think I was there about a year.

Q. And from there where did you go?

—. Then I boarded at the hotel.

Q. Give the name of the hotel.

A. The Goodlow hotel. I was at the Goodlow hotel—I don't know how long. Until the spring, anyhow. And then I went away and was gone all summer. And then I went back again.

Q. Where?

A. And was at the Goodlow hotel again in the fall. I don't remember when I left there the last time. That made me be in Pecos a little more than 2 years.

Q. In what occupation or occupations were you engaged while you lived in Pecos city?

A. I was dressmaking most of the time. Mrs. Heitman and I kept boarders a little while during the summer.

Q. Well, the rest of the time. The rest of the time that you were in Pecos, Texas.

A. The rest of the time I was sewing.

Q. State as fully as you can how much money or other personal property you owned at any time in October and November, 1896.

A. How much I owned?

Q. Yes.

A. Well, I don't know.

Q. State what and how much money and other property you owned at any time in October and November, 1896.

A. It was so very little—nothing more than what I worked for.

Q. You can't tell any more definitely how much money and other property you owned in those months?

A. Because I didn't have it. I didn't have enough to keep account of.

Q. State fully what and how much you owned and had
541 any interest in at any time in October and November, 1896.

A. I had an interest in land in Loving county, but I hadn't paid up on it. I still had an interest in it, and I could have owned it if I had paid it up, but I didn't have the money to pay the interest that was owing to the State each year; I couldn't do it and I had to forfeit it.

Q. Could you give the location of each piece of land that you had?

A. I have forgotten the number of the sections. They go by sections. I have forgotten the number. It was in the 40's though; 40 something.

Q. 40 acres?

A. No, sir, the section; they go by numbers.

Q. State the size and value.

A. 640 acres are in a section; and there couldn't be any value put on it; the State sells it for two dollars an acre, but there couldn't be any value put on it; because a person values it at what they are using it for. I couldn't value it, because I wasn't using it.

Q. Was this land purchased under contract, in your name?

A. No, sir, my husband took up the section. His time was out, and I could have prooved up on it if I had had the money to do it with.

Q. And so it was forfeited?

A. And so it was forfeited.

Q. Where was your brother, William A. Hunter, living, and in what occupation was he engaged when you went to Pecos city to live?

A. When I went to Pecos city to live?

Q. Yes.

A. He was in Dallas or Fort Worth when I went to Pecos?

—. ——.

A. Well, I couldn't state that, because I don't know that.

Q. When did he leave Loving county and cease to make that his home?

542 A. About Feb., I think, in 1896.

Q. Where did he go from there, do you know?

A. Well he went to Dallas or Fort Worth, and I don't remember which place he went to first.

Q. Did your brother ever reside in Pecos city?

A. Well, yes, I think he did—well, I don't know; I don't know it either; I couldn't say that either. He was there before I went there. He had been out in that country for 3 years, and he lived part of the time in Pecos, and part of the time in the new county. Loving county was a new county.

Q. Do you know with what family he resided or boarded or what he was doing?

A. I don't know. I didn't even hear him say whether he was boarding at the hotel or where.

Q. And you don't know where he resided or boarded or what he was engaged at?

A. Well he was engaged in business in Loving county.

Q. What was it?

A. It was this irrigation company. He was working at that. They were surveying their ditch lines and that kind of thing.

Q. Do you remember a visit your brother made to Pecos city about the 1st of December, 1896?

A. Yes, sir, he came there about that time.

Q. Do you know how long he had been absent from Pecos city before he came there then?

A. He hadn't been back since he went away in the spring in Feb.

Q. Did you say where he was living in the mean time?

A. He was in Ft. Worth and Dallas. He was in different places; at one place, and the other, as I had letters from him.

Q. Were you acquainted with the financial condition of your brother, William A. Hunter, during the year 1896?

543 A. Not very much. I know very little about his financial affairs, except what I know of his interest in those lands out there of his.

Q. State as fully as you can, what he had.

A. Well, the section of land out in Loving county and his interest in the canal; the company hadn't broken up entirely.

Q. Could you tell how much money or other personal property of all sorts he owned at any time in Oct. or Nov. 1896?

A. I couldn't do it.

Q. How much land did he own or have any interest in in October and November, 1896?

A. Well, he owned the one section, and he had an interest in the canal and in the lands that he had leased from the State, I suppose. I cannot explain it; I don't know how.

Q. Do you know anything more about it than that?

A. There is nothing more to know about it than that, because there wasn't anything more done; because the investment company broke up then; it just fell through with for want of funds.

Q. State fully just what and how much money or other thing of value, your brother, Wm. A. Hunter, gave you or in any way contributed to your support during all the time of your residence in Pecos city, prior to November 28, 1896.

A. Well, he didn't contribute; I worked and took care of myself.

Q. Do you say that he didn't furnish, or give you, or pay you, any money, or other thing of value, during that time? From the time of your residence in Pecos city, prior to November 28, 1896.

A. I don't think he ever gave me anything.

Q. What trunks, or valises, or other baggage, did your brother leave at Pecos city during the period of his absence from that town in the summer and fall of 1896?

544 A. He left a couple of grips with me when he went out to Mentone in Dec.

Q. In 1896?

A. In 1896, yes, sir.

Q. I didn't hear what you said he left.

A. Just a couple of grips.

Q. In whose possession were they left?

A. They were left in mine.

Q. What trunks, or valises, or other baggage, did your brother bring with him when he visited Pecos city about the first of Dec., 1896?

A. He just had those 2 little grips, or packages, was all he had. Just some clothes.

Q. The same that you had?

A. The same that he left with me.

Q. After your brother's disappearance in Dec., 1896, did you sell or otherwise dispose of any trunk, valise or other baggage, or clothing, belonging to your brother?

A. I never sold anything belonging to him.

Q. Didn't you know that any trunk, baggage, or other personal property belonging to your brother, or remaining in your possession after his disappearance, would be valuable evidence in your favor in your suit against the Fidelity Mutual Life Insurance Company?

A. I never thought anything about it.

Q. What was the purpose of your visit to R. D. Gage, the banker, at Pecos city, about the first of January, 1897, when he showed you the insurance policies held by your brother?

A. To ask him about that note that I found among his effects.

Q. Had he the note in his possession, or did you have it in yours when you went there?

A. It was in his grip; in a little old pocket-book. There
545 were papers and things in there, and I was looking through them, and I found that; in a pocket-book.

Q. Had you any purpose when you went to see this Mr. Gage except to inquire about that note?

A. That was all.

Q. Now, state when you first saw and came into possession of that note.

A. I couldn't give any date at all, but I was looking through those things and I came across that note among his papers that were in one of those grips.

Q. Can't you get at the date?

A. Well, I couldn't give anywheres near it, no. Of course, it was in January, or—it was after—well, I will get all tangled up; I cannot answer it so you can get it down straight. I will begin again: I cannot give the date; but it was after the report of his death anyhow.

Q. Had you known, or had you heard anything about that note before you found it in that pocket-book?

A. No, sir, I didn't know anything about the note. I just found it. I knew the party who the note was on. After his camp had been found and it was reported he was dead, it was after that that I was looking through those things and found this note.

Q. When you found the note—up to that time had you ever heard of that note?

A. No, I hadn't.

Q. And your brother hadn't mentioned it?

A. No, sir.

Q. And you didn't know of its existence?

A. No, sir.

Q. I will ask whether you ever paid to your brother, William A. Hunter, the amount that you collected on that note or any part of it.

546 A. I spent it myself.

Q. Well, just answer the question. Did you ever pay to your brother, William A. Hunter, the amount you collected on that note, or any part of it?

A. No, sir, no part of it.

Q. State fully what other papers were found in the package with the insurance policies when Mr. Gage opened the package and showed you the contents.

A. I think—I am sure, too—that those pieces of county script were with them.

Q. Was there anything else?

A. Nothing else that I remember of.

Q. What did you say was the face amount of that script—that county script?

A. I think, if I remember right, it was about $600.

Q. $600?

A. I don't think it was more than that.

Q. And your recollection now is that that Loving County script amounted to only $600?

A. That is as near as I can remember.

Q. What disposition did you make of that script?

A. I left it, I think, with Mr. Gage, to present to the commissioners, to see if he could get something out of it, and he told me at the time that it wasn't worth a cent, and it never has been.

Q. Did you ever turn any of the papers, or their proceeds, over to your brother, William A. Hunter?

A. No, sir.

Q. Don't you know, or didn't you hear that after you found this script in that package, that Reeves county had compromised and paid off all the Loving County script at about 60 per cent. of its face value?

A. I didn't know it.

547 Q. You say you didn't know it?

A. I didn't know it.

Q. You were never informed, then, by Mr. Gage, or anybody else, that 60 per cent. was realized upon that script?

A. I never was, and never heard that there was any of it overpaid.

Q. When did you first learn that a man named Wallace claimed to have seen your brother, William A. Hunter, in Nashville, in January, 1897?

A. I saw that in some of the papers. In a paper that was sent from home, I believe.

Q. Sent from where?

A. I think the paper that that was in was sent from Ohio. I think it was published in a Newark paper and was sent to me from Ohio.

Q. And when did you first learn it?

A. I couldn't give the date of it.

Q. Or, the year?
A. Well, I think it was that same spring. In 1897.
Q. Wasn't it in January, 1897?
A. It might have been. I couldn't give the dates. I don't remember it.
Q. And you say the first announcement you had of the fact—that is, that Wallace had seen him in Nashville, was in a paper published in Newark?
A. Just a clipping from a Newark paper.
Q. Just a clipping from a Newark paper?
A. Yes, sir.
Q. And sent to you.
A. My people cut it out of the paper and sent it to me.
Q. That is, your people in Homer?
A. In Homer, yes, sir.
Q. I will ask you: What effort did you then make to ascertain whether it was true that your brother had been seen alive in Nashville? After his disappearance. And whether he was still
548 there.
A. I didn't make any at all.
Q. Why didn't you?
A. Well, I don't know why I didn't, but I didn't. Because I didn't believe it, I guess.
Q. Where were you living on April 30, 1903?
A. I was living in Newark.
Q. In Newark?
A. Yes, sir—on April 30th?
Q. Yes.
A. Well, I wasn't in Newark, but that was my home.
Q. This was your home?
A. I wasn't right here, but this was my home. I was living at my father's.
Q. I will ask you whether — ever, at any time after April 26, 1903, received, either directly or indirectly, any communication, either written or oral (that is, not in writing) from your brother, William A. Hunter, or from any other person, claiming to write or speak in his behalf?
A. Will you give me that question again?

The examined read the above question to the witness.

A. In 1903, did you say?
Q. At any time after April 26, 1903. Whether you received either directly or indirectly any communication, either written or oral from your brother, William A. Hunter, or from any other person, claiming to write or speak in his behalf?
A. No, sir.
Q. Then, you say you didn't receive any communication whatever from your —, William A. Hunter, at any time after April 26

1903, or from any other person claiming to write or speak in his behalf. Is that what you say?

A. Yes.

549 Q. And on July 2, 1902, you deposited New York exchange to the amount of $11,160. in Wilson's bank, at Utica, didn't you?

A. I deposited that.

Q. Yes.

A. Yes, sir.

Q. What was that made up of—that deposit?

A. New York draft.

Q. Draft or drafts?

A. I don't remember whether there was more than one; there were checks and draft.

Q. Checks or drafts, or both, of that amount?

A. Yes, sir.

Q. And they were sent by your attorney at Dallas as part of the proceeds of your judgment against the Fidelity Mutual Life Association.

A. Yes, sir.

Q. State for what purpose the two checks for one hundred and eighty-five and three hundred and seventy-four dollars, respectively, in favor of W. A. Hunter—for what purpose they were drawn.

By Mr. B. G. SMYTHE: W. A. Hunter, Sr.

Q. Yes, sir. That is your father?

A. Yes, sir, senior, it should be; that is my father. The one hundred and eighty-five dollars was for my expenses for myself and my sister when I started on that excursion west; and I thought that wasn't quite enough and my father wanted to borrow some money and I had him draw enough over and above what he wanted to use for myself also, and that is included in that three hundred and seventy-four dollars.

Q. How much of that was a loan to your father?

A. About $300. I couldn't tell exactly; I have forgotten.

550 Q. Has that loan ever been paid?

A. That loan has been paid, yes, sir.

Q. He doesn't owe you anything on it then?

A. Not anything.

Q. September 27, 1902, Wilson's bank paid your check for $700. in favor of C. R. Hunter. Who is he?

A. He is my brother in Oklahoma.

Q. He lives where?

A. He lives in Oklahoma.

Q. And the purpose for which that check was drawn was stated by you before.

A. I stated it before, yes, sir. To buy some cattle.

Q. It didn't represent, then, a loan to your brother?

A. Sir?

Q. That $700. wasn't a loan to your brother?

A. No, sir.
Q. And he doesn't owe you anything on that?
A. No, sir.
Q. Does he owe you anything on the cattle transaction which he managed?
A. No, sir.
Q. What was this check for $1890. for?
A. That was to pay for some property on Elmwood avenue.
Q. The train from Newark to Utica in 1903, left pretty early in the morning, didn't it?
A. I don't know.
Q. On the morning that you drew out that $7134.17, you left on the morning train, didn't you, for Utica?
A. No, sir.
Q. If not, how did you get to Utica?
A. I went to Utica in a buggy. There was no train to go on—from Homer to Utica.
551 Q. Well, it is true that on the morning of April 30, 1903, you called at Wilson's bank and drew out your entire balance, didn't you——
A. Yes, sir.
Q. Of $7134.17?
A. I did.
Q. Now, I will ask you—after withdrawing this money from Wilson's bank, did you at any time deposit it, or any part of it in any bank, either in your own name or the name of any other person?
A. I decline to answer that.
Q. What did you say?
A. I decline to answer it.
Q. I will *will* ask you again why you decline to answer.
A. It might——

By Mr. SMYTHE (interrupting): I object to the question. I object to it because it is immaterial.

The WITNESS: Well, I will decline to answer.
By Judge KIBLER: You decline to answer?
A. I decline to answer.
Q. After withdrawing this money from Wilson's bank, did you at any time deposit it or any part of it, or endorse it, to any person, form, or corporation, either in your own name, or in the name of any other person?

By Mr. B. G. SMYTHE: I object because it is im-aterial.

A. I decline to answer.
Q. If you loaned out any of the money that you withdrew from Wilson's bank, state fully as to each loan made, the amount, when, and to whom it was made; upon what security it was made; to

what extent it was repaid, and whether you still own it, and how much is still owing to you on account of it.

A. I will have to hear that again.

(The examiner read the question.)

552 A. I don't know just how to do it. Shall I commence with the first checks in that way?

Q. The first part of the question is: If you loaned out any part of the money that you withdrew from Wilson's bank, state fully as to each loan made.

A. Well, I loaned to my father $300. and some.

Q. That is, since you drew the money out, I am asking you about.

A. Since I drew it out?

Q. Yes.

A. I haven't loaned it.

Q. This is all from the time you got this seven thousand dollars from the bank. I am asking, you if you loaned any of that money out, to state.

A. Well, I decline to answer. I thought you meant those checks.

Q. Have you invested any portion of the money that you withdrew from Wilson's bank in real estate, either in your own name or in that of any other person?

A. I decline to answer it.

Q. Have you invested any portion of the money that you withdrew from Wilson's bank in notes, bonds, stocks or personal property of any kind, either in your own name or in that of any other person?

By Mr. SMYTHE: I object to that as being im-aterial.

A. I decline to answer it.

Q. State fully and in detail how much you still own of the fund of $7134.17, which you withdrew from Wilson's bank, and in what form it now exists, showing all the items of money and other property now composing the fund.

By Mr. SMYTHE: I object to the question as being immaterial.

553 A. I decline to answer it.

Q. Give a full and itemized statement of all moneys and other property, real or personal, which you have owned at any time since April 30, 1893, other than the fund of $7134.17, withdrawn from Wilson's bank.

By Mr. SMYTHE: I object to that as immaterial.

A. I decline to answer.

Q. How much of it do you now own and in what form does it exist?

Objected to as being immaterial.

By Mr. SMYTHE: I decline to answer it.

Q. What have you done with it?

By Mr. SMYTHE: I object to it as immaterial.

A. I decline to answer it.

Q. What have you done with that which you do not now own?

By Mr. SMYTHE: I object to it as immaterial.

A. I decline to answer it.

Q. Now, isn't it true that about July or August of 1903, you saw several photographs of your brother, William A. Hunter, taken a short time before, and while he was a prisoner in the jail at Birmingham, Alabama?

A. About when do you say?

Q. July or August, 1903. Whether you saw several photographs of your brother, William A. Hunter, taken a short time before that, and while he was a prisoner in the jail at Birmingham, Alabama?

A. A lawyer sent a picture purporting to be one of his.

Q. What is that answer?

A. A lawyer sent a picture purporting to be one of his.

Q. State whether or not it was a portrait of your brother.

A. Well, I couldn't vouch that it was.

Q. What is the answer?

A. I couldn't vouch that it was.

554 Q. State whether it resembled him or not.

A. It somewhat resembled him.

Q. Had you any doubt that it was a portrait of your brother?

A. Well, I didn't know.

Q. Now, isn't it true that when you withdrew the money from the Wilson bank, you expected that the Fidelity Mutual Life Insurance Company would bring a suit against you to recover back the money that it had paid you on account of the insurance on your brother's life?

A. I didn't know what they might do.

Q. State whether that wasn't the reason that the next day after you saw the notice in the Newark paper that you have mentioned, that you went and withdrew that money.

A. After I saw the notice in the paper, did you say?

Q. Yes.

A. I lost part of the question.

By Judge KIBLER: Read it.

The EXAMINER (reading): "Q. Now, isn't it true that when you withdrew the money from the Wilson bank, you expected that the Fidelity Mutual Life Insurance Company would bring a suit against you to recover back the money it had paid you on account of the insurance on your brother's life?"

"State whether that wasn't the reason that the next day after you saw the notice in the Newark paper that you have mentioned, that you went and withdrew that money."

A. I drew it when I saw that notice in the paper, yes.

Q. Didn't you withdraw that money from the Wilson bank because you wanted to get it out of the reach of the insurance company?

A. I wanted to get it out of the reach of anything that was liable to interfere with it. I believed they wanted to do me crooked.

Q. Then, it was your purpose, was it not, to get it out of
555 the reach of the insurance company?

A. Why, of course.

Q. How?

A. Yes.

Q. A few months ago, in a suit brought at Birmingham, Alabama, by the Fidelity Mutual Life Insurance Company, against your brother, W. A. Hunter, Hunter sued out a commission to take your deposition, and the insurance company propounded numerous cross-interrogatories to you, and you refused to appear. Isn't that so?

A. I didn't.

Q. About the first *of* second of May, 1903, you made oath before the tax assessor in Newark, that you had no money or personal property of any kind.

A. I didn't make any oath to anything of the kind.

Q. What did you say?

A. I didn't make any oath to anything of the kind.

Q. You didn't?

A. No, sir.

Q. The assessor came to you and asked you for a statement under oath of any property of yours that was subject to taxation. Now, why didn't you tell him about this $7134.17 which you had just before drawn out of the Wilson bank?

By Mr. SMYTHE: I object to the question on the ground that it is immaterial.

A. I decline to answer.

Q. What did you say?

A. I decline to answer.

Q. Is Mr. Smythe here to make an objection, and then you assume from that objection that you must decline to answer the question?

A. No, sir.

Q. Have you any understanding with him that that is to be the way of it?

A. No, sir, none at all.

556 By Judge KIBLER: Well, what was the answer to the other question?

The EXAMINER (reading): "Q. The assessor came to you and asked you for a statement under oath of any property of yours that was subject to taxation. Now, why didn't you tell him about this $7134.17 which you had just before drawn out of the Wilson bank?"

"A. I decline to answer."

By Mr. SMYTHE: My objection is that it is assuming things to be so that do not appear in the evidence.

Q. Did you sign a paper presented to you by the assessor in May, 1903?

A. I don't think I signed any paper at all. I don't remember that I signed any.

Q. Are you sure that you didn't?

A. I haven't thought about it—anything about that; I don't know; I couldn't be sure that I didn't, but I am quite sure—as sure as I could be of any matter, but I don't know just exactly that I didn't do it.

Q. The assessor was there to see you, wasn't he?

A. He was there to see my father. But I don't remember what he said to me. He asked me some questions, but I didn't make any oath to anything, and I didn't understand at the time anything about it.

Q. You didn't tell him, then, that you had recently withdrawn $7134.17 from the Wilson bank, did you?

A. He didn't ask me any questions about it.

Q. I didn't ask you whether he asked you any questions, but I want you to answer this question.

A. No, sir; I didn't tell him.

Q. Now, what, if anything, occurred after Dec. 3, 1896? so as to estrange you from your brother, W. A. Hunter, that you wouldn't afford him any assistance in making his defense against the
557 criminal charge brought against him by the grand jury of Dallas county after he had been so kind as to place insurance on his life for $15,000. in your favor, out of which you realized over eleven thousand dollars?

A. Well, in the first place, I didn't believe it was him that they had.

Q. You didn't believe what?

A. I didn't believe it was William A. Hunter that they had arrested.

By Judge KIBLER: Read the question again.

The EXAMINER (reading): "Q. Now, what, if anything, occurred after Dec. 3, 1896, so as to estrange you from your brother, W. A. Hunter, that you wouldn't afford him any assistance in making his defense against the crim-nal charge brought against him by the grand jury of Dallas county after he had been so kind as to place insurance on his life for $15,000. in your favor, out of which you realized over eleven thousand dollars?

A. I have the answer that I didn't believe it was he that they had arrested.

Q. That question refers to a criminal charge brought against him by the grand jury of Dallas county. Now, why didn't you assist him in his defense down there, or, why did you refuse to assist him?

A. Well, I didn't have any reason, only that I didn't know whether it was him or not.

Q. Didn't know what?
A. I didn't know whether it was him or not.
Q. Had you any reason to doubt that it was him? Or have you now?
A. I have no reason to beli-ve that it was.
Q. Since he was arrested in Birmingham, Alabama, or was indicted by the grand jury of Dallas county, Texas, have you
558 had any communication with your brother?
A. How was that?

The EXAMINER (reading): "Q. Since he was arrested in Birmingham, Alabama, or was indicted by the grand jury of Dallas county, Texas, have you had any communication with your brother?
A. Well, I don't care to answer that.
Q. What do you say?
A. I don't care to answer that question.
Q. Why don't you care to answer the question?
A. I decline to answer.
Q. What did you say?
A. I decline to answer.
Q. Do you not know, from letters or communications that you received from your brother, that he was alive when he was arrested in Birmingham, Alabama, and when he was indicted by the grand jury of Dallas county, Texas?
A. I have no answer. I decline to answer.
Q. State whether you have been instructed by any person whatever to decline to answer these questions.
A. I haven't.

By Judge KIBLER: Now, I insist that these questions be answered, every one of them, that she has declined to answer.

The EXAMINER:

Q. Why do you refuse to answer those questions?
A. Well, it might——

The EXAMINER:

Q. Is it because your answers might tend to incriminate you?
A. Yes.

By Judge KIBLER: That is all.
By Mr. SMYTHE: That is all.

JENNIE M. SMYTHE.

559 STATE OF OHIO, } ss:
Licking County, }

I, Charles C. Cooper, special examiner, duly appointed by an order made in chambers by the Honorable D. E. Bryant, United States district judge, August 8, 1904, in the above entitled case, do hereby certify that the above named Jennie M. Smythe, was by me

first duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that such examination took place in the presence of Judge Charles H. Kibler, council for plaintiff, and B. G. Smythe, council for defendant, at my office, at the court house, Newark, Licking county, Ohio, on Monday, January 23, 1905; that the deposition subscribed by said witness as above set forth was reduced to writing by myself in the presence of the witness; that the above testimony was read over to the witness and signed by her in my presence and in the presence of the said Kibler and Smythe, council for both parties. That I am not council, attorney, or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof, I have hereunto set my hand, this 23rd day of January, A. D. 1905.

CHAS. C. COOPER,
Special Examiner.

Cost Bill.

Taking deposition	21.90
Postage	.20
	22.10

Rec'd of Jennie M. Smythe $22.10 in full

CHAS. C. COOPER,
Special Examiner.

Endorsed No. 597 Eq. Deposition Mrs. Jennie M. Smythe. Filed 30th day of January, 1905, J. H. Finks, clerk, by C. B. Hollarn, deputy.

560 Number D73374.

The Fidelity Mutual Life Association of Philadelphia. Policy of insurance on the life of William A. Hunter. Amount $5,000. Date October 31, 1896. Semi ann'l. Rate $32.55. Payable the 28 day of Oct. and Ap'l. Add $3.00 per $1000 to first payment. Age 33. Name of agent A. J. Brown.

(The above words and figures appear on back of policy.)

(On first page of policy, the following words and figures appear.)

Number D73374. Amount, $5,000.

Age, 33.

The Fidelity Mutual Life Association of Philadelphia, Penna.

Term Rate.

Stipulated Annual Premium.

For expense fund	$20.00
For mortuary fund	41.00
For equation fund	2.15
Total	$63.15

By this policy of insurance agrees to pay the sum of five thousand dollars upon the surrender of same properly receipted within ninety days after the acceptance of due and satisfactory proof of the death of William A. Hunter, of Pecos, county of Reeves, State of Texas, (the member insured under this policy) and of claim hereunder to his sister Jennie M. Mettler, or if the member survive the aforesaid beneficiary to his administrators, executors or assigns, subject to all the requirements, privileges and provisions stated on the following pages, which are conditions precedent and are a material part of this contract as fully as if they were recited at length over the signatures hereto affixed.

561 First Page of Policy, Cont'd.

This contract is made in consideration of the written application of the above named insured, which is made a part hereof, a copy of which is hereto attached, and the stipulated payment in advance to said association of thirty-two and 55/100 dollars upon the twenty-eighth day of the months of October and April in every year, for the period of ten years from October 28th 1896, and thereafter this policy may be continued in force without medical re-examination by the payment of the stipulated premiums endorsed hereon according to the attained age for either term of years or for life.

In witness whereof, the Fidelity Mutual Life Association has, by its president and treasurer signed this contract at its office in Philadelphia, attested by the secretary this thirty-first day of October 1896.

L. G. FOUSE, President.
O. H. BOBYSHELL, Treasurer.

Attest:
[SEAL.] W. A. CAMPBELL, Secretary.
Examined by
E. M. A.

562 Privileges and Provisions Referred to in the Body of This Policy as Conditions Precedent.

First. Application.—The application, copy of which is given on third page of this policy, forms the sole basis of this contract, and it is hereby made the duty of the insured hereunder to review the copy of said application, and to report promptly to the president of the said association any misstatements, errors, or omissions.

Second. What shall constitute delivery.—The delivery of this policy shall not be actual and binding unless a receipt for the payment in cash, or its equivalent, of the first premium, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment, be delivered with and accompany the policy within sixty days from the

date hereof, and during the life-time and good health of the person on whose life it is issued.

Third. Change of beneficiary and assignment of policy.—With the written approval of the president or vice-president, the beneficiary herein named may be changed upon the written request of the member by the surrender of this policy; and this policy, upon written request, with the written consent of the president or vice-president, may be assigned. In either event a fee of $1.00 must accompany such written request.

Fourth. Notice of premium.—The member shall give prompt notice to the treasurer of the association of any change of residence or post-office address. An affidavit by the mailing clerk of the association, showing that a notice of any matter affecting this contract was mailed in the regular course of business to the member, or person designated by the member, to the last address as shown by the books of the association, shall be taken and admitted as evidence, and held to be conclusive proof of due notice to the member, or person designated by the member, of any matter affecting this contract. Notice of each and every payment, due or to become due, hereon is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived.

563 Fifth. Revival of policy in the event of lapse.—In case of lapse or forfeiture of this policy, it may be revived upon the written approval of the president or vice-president, and medical director, but not otherwise, subject to the rules of the association.

Sixth. Proofs of loss and claim.—In the event of the death of the within-named insured, the claimant shall promptly furnish due and satisfactory proof to the said association at its home office in the city of Philadelphia of the death and of the just and lawful claim both as to the rights and interests of the beneficiary hereunder, as well as to the justness of the claim, upon the blank forms furnished by the said association, which shall include all information required thereby.

Seventh. Limitation for action.—No suit or action herein shall be maintained unless actually begun within one year from the day of the death of the member, without reference to the time of furnishing the proofs of death. If any suit in law or equity be commenced after such period of one year, the lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding.

Eighth. Power of agents.—No agent of the association has any power or authority to make, alter, or discharge contracts, waive forfeitures, or grant credit; and no alteration of the terms of this contract shall be valid and no forfeiture hereunder shall be waived, unless such alteration or waiver be in writing, and be signed by the president of the association, it being understood, that the powers which the president can exercise as herein stated shall not be delegated.

Ninth. Indebtedness.—Any portion of the stipulated premium

for the current year of the death of the insured remaining unpaid at time of death, or any indebtedness of the member, or beneficiary, to said association, shall be deducted from the amount payable hereunder.

564 Tenth. Payment of premiums.—Any moneys required to be paid under this policy during the continuance of this contract must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made as evidence of such payment to him; otherwise this policy shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to the said association, unless otherwise herein provided. A premium other than that stipulated herein will be accepted according to the association's table of rates, and the same will continue this policy in force for such time as may be mentioned in the receipt for such payment, which must be signed as aforesaid.

Eleventh. Incontestability.—If this policy shall have been in continuous force after three years from the date hereof, it shall, in the event of the death of the member, or insured, be incontestable for the sum payable hereunder, but in the event of the death of the member within the period of three years, then if any statement contained in the application on which this policy is issued be found untrue in any respect, or if the member shall die by his own hand, whether sane or insane, or at the hands of justice, or through the habitual use of narcotics, or alcoholic of other stimulants, this contract shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to said association.

Twelfth. Military service, travel and occupation.—Permission is hereby given to the within-named insured to engage in any military or naval service, except in time of war, to travel and reside in any part of the civilized world at all seasons of the year, except south of the tropic of cancer, and to engage in any and all occupations or employments other than those mentioned in the application, except those classified in the prospectus of the asso-

565 ciation as being more hazardous or unhealthy. In the event of the insured's engaging in military or naval service in time of war, or traveling south of the tropic of cancer, or engaging in any occupation classified in the association's prospectus as more hazardous or unhealthy than those mentioned in the application, without first obtaining the written consent of the president, then this policy shall be absolutely void, except as to the moneys paid hereon, which moneys in either of such events shall constitute the sum insured, and the association's liability under this policy.

Thirteenth. Notice of the object and purpose of payments required hereunder.—The payments required hereunder shall be applied to the several purposes specified on the first page of this policy and as hereinafter provided, but the premium payable the first policy year, less the actual mortality cost, and any saving in the

contributions to the mortality fund during the next four years, shall belong to the expense fund of the association, and any deficiency in the mortality fund, or any taxes and fees levied by public authority, or expense of investigating and defending fraudulent claims, shall be paid or made good out of the equation fund, the main purpose of which is to equalize the increasing mortality cost due to advancing age, and which shall be deemed and regarded as a surplus of the association.

Fourteenth. Safety clause.—The stipulated premium payable hereunder being based on past insurance experience, it is agreed and understood, excluding the first policy year, that the proportion of the undivided equation fund aforesaid to be maintained on behalf of this policy shall equal the present worth of the sum insured, less the present worth of the future stipulated premiums, according to the association's past experience, computed at four per cent. per annum. If a deficiency shall occur in the equation fund, to be determined by the periodical valuations to be made, as required by the association's by-laws, the same shall be made good by the payment by every member of the association as his
566 pro rata share of such defi-ency within thirty days from the date of notice of same, or with the consent of the directors, the amount thereof, together with interest at the rate of six per cent. per annum, may be charged against the member's policy, and deducted therefrom when it becomes a claim. Provided always, that the accumulated funds of the association, as required by statute, shall at no time be less than the sum of one periodical or stipulated payment by all the members, and not less than $100,000.

Fifteenth. Surrender value.—This policy being issued at term rates has no surrender value, but in the event of its continuance beyond the first term, the savings from any source during the first or any subsequent term shall be converted into a life annuity dividend and applied to the reduction of the stipulated premiums payable hereunder. This policy may be exchanged at any time for an elective life or limited advance payment policy, to be issued without medical re-examination at the attained age.

Sixteenth. No personal liability.—In the event of the lapse, surrender, forfeiture, or termination of this policy, from any cause, all personal liability of the member, or insured, shall *ipso facto*, or by the act itself, cease and terminate.

Seventeenth. Mutual principle.—It is understood, that the said association is purely mutual, that there are no proprietary or stock interests, that the amount named in its policies is conditioned upon the proceeds of payments made or to be made by its members, and that it is not required to maintain a legal reserve, but simply maintains such a reserve or accumulation as is necessary to enable it to carry out its contracts with members in good faith, and that it grants the insurance on the flexible premium or assessment plan, and is governed in accordance with its by-laws.

Form B—Term rate—Edition Oct. 1896—No. 111 (B).

567 Renewal Term Rates.

Attained age.	10-year term.	15-year term.	20-year term.	Whole life.
31	12.29	12.57	12.93	21.49
32	12.46	12.77	13.16	22.04
33	12.63	12.98	13.40	22.62
34	12.82	13.22	13.67	23.23
35	13.04	13.52	14.02	23.87
36	13.32	13.88	14.42	24.54
37	13.64	14.28	14.86	25.26
38	14.00	14.72	15.36	26.02
39	14.42	15.22	15.94	26.82
40	14.90	15.78	16.60	27.68
41	15.44	16.40	17.34	28.59
42	16.04	17.08	18.16	29.55
43	16.70	17.82	19.06	30.58
44	17.42	18.62	20.04	31.68
45	18.20	19.48	21.10	32.85
46	19.04	20.40	22.38	34.08
47	19.94	21.40	23.80	35.39
48	20.90	22.48	25.42	36.77
49	21.94	23.64	27.18	38.23
50	23.06	24.90	29.02	39.78
51	24.28	26.58	31.00	41.42
52	25.64	28.34	32.86	43.15
53	27.16	30.32	34.88	45.00
54	28.84	32.48	37.02	46.95
55	30.70	34.80	39.36	49.03
56	32.76	37.24	41.96	51.23
57	34.98	39.86	44.78	53.57
58	37.46	42.74	47.82	56.07
59	40.08	45.78	51.00	58.72
60	43.02	49.16	54.48	61.56
61	46.02	52.48	57.90	64.57
62	49.26	56.02	61.50	67.78
63	52.74	59.82	65.32	71.20
64	56.52	63.86	69.38	74.84
65	60.56	68.20	73.64	78.72
66	64.94	72.80	78.12	82.84
67	69.62	77.70	82.88	87.24
68	74.62	82.88	87.88	91.91
69	79.98	88.38	93.12	96.89
70	85.76	94.20	98.74	102.20
71	91.90	100.36	104.64	107.87

Renewal Term Rates—Continued.

Attained age.	10-year term.	15-year term.	20-year term.	Whole life.
72	98.46	106.90	110.88	113.91
73	105.48	113.84	117.44	120.36
74	112.94	121.22	124.42	127.25
75	120.90	129.04	131.80	134.61
76	129.40	137.34	139.62	142.49
77	138.48	146.18	147.96	150.94
78	148.18	155.56	156.86	159.98
79	158.60	165.50	166.38	169.68
80	169.74	176.04	176.58	180.10

The above premiums will be diminished by such an annuity dividend as the savings for the preceding term will afford.

The insured may exchange this policy as provided in the 15th section.

568 Copy of Application upon Which Policy No. D73374 is Issued.

Application.

1st. I hereby apply to the Fidelity Mutual Life Association of Philadelphia, Pa., for a policy of insurance, to be issued in pursuance of this application.

2nd. I certify that my full name is William Addison Hunter, that I was born on the 22nd day of June A. D. 1863 at or near Homer, Ohio.

3d. That I am now in good health and am free from any and all diseases, sickness, ailments, or complaints, trivial or otherwise, except I have a slight catarrhal affection when I have a bad cold. (If ailment of any kind exists at this time, state character or nature of same.)

4th. That my present occupation is real estate & farming. (If more than one occupation, give all, and be specific.) Prior was book keeping.

5th. That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint except as here stated. (Give full particulars as to the nature thereof, date and duration, whether trivial or otherwise—if rheumatism, state whether muscular, or sciatic or inflammatory.) I had a spell of slow fever in the summer of 1886. Was sick about 32 days. Fully recovered. I also had measles, mumps &c. during boyhood. La grippe 1888.

6th. That the last physician I consulted or who prescribed for me was Dr. Duringer of Fort Worth, Texas, about summer of 1886, (give date) for the sickness here stated: Slow fever above stated. (Give nature and duration of illness, and if complete recovery, say so.)

7th. That I have not consulted or been prescribed for by any other physician or medical man during the last ten years, [except as here stated].* (Give date, nature of illness, and name of every physician for last ten years.)

8th. That I have never made application for insurance on my life to any company, association, or society, upon which application no policy was or has yet been issued to or received by me for the full amount and kind and at the rate applied for, and that no physician has ever given an unfavorable opinion upon my life with reference to life insurance, [except as here stated].* (Give name of each company, date of application, kind of policy, and amount applied for.)

569 9th. That none of my immediate family, parents, brothers or sisters, nor, to the best of my knowledge and belief, grand parents, uncles and aunts, are now afflicted with, or ever had, or died of consumption, lung disease, scrofula, cancer, heart disease, paralysis, suicide, insanity, epilepsy, Bright's disease, diabetes, or any hereditary disease, [except the following:]* (Give relationship, character and duration of illness in every case. Avoid any general terms—be specific.)

10th. That I am not now, and have never been, engaged in the sale or manufacture of wines, spirits, or malt liquors, either directly or indirectly—[except]*— (Give dates and full particulars.)

11th. That I do not use, and have never used, spirits, wines, malt liquors, or narcotics, and have always been temperate and sober except as stated below: (Answer must be specific—"moderately" or "occasionally" will not do. Give kind and daily quantity, and the number of times you have used them, or any of them, to extent of inebriation.) I will not average more than one glass of beer per month.

12th. That I am not, now insured in this association, and that the total amount of insurance now on my life is $ none, the kinds of policies, dates of same, amounts and respective companies being as follows. (Give name of each company, amount, kind and date of policy.)

13th. That the money to keep policy in force will be furnished by myself.

14th. That the following are three intimate friends (not relatives) who have known me for the last two years:

John Stewart, collector for Altman Miller Implement Co., Dallas.
D. H. Swaits, photographer, Ft. Worth, Tex.
C. F. Thomason, merchant, Pecos city, Tex.

[* Words enclosed in brackets erased in copy.]

I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, are material to the risk, and are the sole basis of the contract with the said association; that I have signed this application in my own proper handwriting; that all provisions of law forbidding any physician who has or shall have attended me from dis-
570-579 closing any and all information which he acquired by such attendance, together with any such provisions affecting the uses which shall be made of this application, or any part hereof, and all provisions of law in conflict with or varying the terms of this agreement and policy applied for, are hereby expressly waived; that the policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health; that no statement, to whomsoever or howsoever made, shall modify this contract, or in any manner affect the rights of the association, unless the same be reduced to writing, and be presented to and approved by the officers of the association at the home office in Philadelphia, no agent or examiner having any power or authority to make or alter contracts, waive forfeitures, or grant credit; that the proofs of death and claim required shall be made upon the blank forms furnished by the association, and shall include all information required thereby, and in accordance with the association's by-laws; that I will not, without the written consent of the president, engage in any occupation or employment more hazardous than that above mentioned; and that if any concealment, or untrue statement, or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void and all moneys paid hereon shall be forfeited to said association; provided always, that if the necessary payments be made to keep said policy in force, it shall in the event of my death be incontestable for the sum payable thereunder after three years, except as therein set forth.

Dated at Dallas, Texas, this 28 day of Oct. 1896.

(Signed) W. A. HUNTER.

Signature of applicant must be in his own proper handwriting.

Witness:

—— ——.

The witness should be the soliciting agent.

580 "Policy D73372 and policy D73373, differing from policy D73374 only in the serial number, were also put in evidence by the plaintiff."

581 File No. 35718. Ledger 25, Page 41.

W. A. Hunter, Loving County.

Section 34, Block 55. Certificate 4989, T. & P. R. R. Co. Va
$1280.00. Note, $1248.00. First Payment, 32.00. Interest,
Receipt No. 10004, Sept. 27th, 1893.

Date.	Principal.	Receipt No.	Date.	Interest.	Receipt
1893.					
Sept. 6. To obligation $1248.00					

Forfeited—non payment interest to 8/1/95.

I, Jno. W. Robbins, treasurer of the State of Texas, do hereby
tify that the foregoing is a true and correct copy of this accoun
shown by the records of this office.

In testimony whereof witness my hand and official seal at Aus
Texas, this the 23rd day of February 1904.

(Signed) JNO. W. ROBBINS, Treasure

[SEAL.]

582 File No. 35969. Ledger 25, Page 136.

W. A. Hunter, Loving County.

Section 46, Block 55. Certificate 4995, T. & P. R. R. Co. Va
$1280.00. Note, $1248.00. First Payment, 32.00. Interest,
Receipt No. 10182, Feb'y 5th, 1904.

Date.	Principal.	Receipt No.	Date.	Interest.	Receipt
1894.					
Jan. 24. To obligation 1248.00					

Forfeited—non payment interest to 8/1/95.

I, Jno. W. Robbins, treasurer of the State of Texas, do hereby
tify that the foregoing is a true and correct copy of this accoun
shown by the records of this office.

In testimony whereof, witness my hand and official seal at Aus
Texas, this the 23rd day of February 1904.

(Signed) JNO. W. ROBBINS, Treasure

[SEAL.]

583 Copy of Letter of Mrs. Mettler.

Received 10 Jan. 8, 1897.

PECOS, TEXAS, Jan. 2, '97.

The Fidelity Mutual Life Association of Philadelphia, Philadelphia, Pa.

GENTLEMEN: Kindly send me such blanks as may be required by your association, in order that I may have same properly filled to establish proof of my brother's death and to collect on policies D 73372, D 73373 and D 73374.

Yours respectfully, JENNIE M. METTLER.

This notation appears in lower left hand corner: "Wm. A. Hunter."

On the back of above letter the following words and figures appear:

10-28-96.

D 73372.
William A. Hunter, Pecos Reeves Co. Texas. His sister Jennie M. Mettler.
33-5000 A. J. Brown.
D73373-5 same
D73374-5 same
All p'd to April 28/97
Made sem-a. pay. on each one carrying from Oct. to Ap'l.

584 Proof of Death and Justness of Claim Submitted to the Fidelity Mutual Life Association of Philadelphia, Penna.

William A. Hunter of Pecos, Texas, insured under policies Nos. D73372-3 and 4 for $15,000.00, having died on the 3rd or 4th day of Dec. 1896, the claimant under said policy submits the following statements, under oath, in proof of the death and justness of claim under said policy.

NOTE.—The association expressly reserves the right, if the questions submitted are not fully answered, or when answered fail to give the information wanted, to call for supplementary proofs, and such other information as will enable it to judge of the identity of the person, the justness of the claim, etc.

Claimant's Statement No. 1.

(Every Question Must be Distinctly and Fully Answered.)

Q. 1. Names, ages and residences of claimants. (If claimant be executor, administrator or guardian, certified copy of appointment must be furnished. When any of the claimants are minors, guard-

ian must be appointed, and certified copy of letter of guardianship furnished with proofs.)

A. 1. Jennie M. Mettler, age 35, residence Pecos, Texas.

Q. 2*a*. Place of birth of deceased?

A. Two miles from Homer, Ohio.

b. Date or birth. (State source from which date of birth was obtained.)

A. *b*. I don't know exact date of his birth, but he was older than I by about two years & I was born May 18th, 1861.

Q. 3*a*. Place of death?

A. *a*. Near lines of Loving & Wood Co.

Q. *b*. Date of death?

A. *b*. Either 3rd or 4th of Dec. 1896.

Q. 4. Occupation at date of insurance?

A. 4. Assisting in photograph gallery.

Q. 5. Occupation at the beginning of last illness?

A. 5. Was not sick.

585 Q. 6. How long had you personally known deceased?

A. 6. Since my birth.

Q. 7*a*. When did health of deceased first begin to be effected?

A. 7*a*. Was not effected.

Q. *b*. State fully first symptoms.

A. *b*. None.

Q. *c*. Duration of last illness.

A. *c*. Instantaneous.

Q. *d*. Cause of death.

A. *d*. Drowned.

Q. 8. Name and address of every physician who attended, or was consulted by, or who prescribed for deceased, during the past five years, giving dates.

A. 8. None that I know of.

Q. 9. Has deceased, within the last five years, traveled or resided away from his home? If so, when, for what period and at what place?

A. 9. Fort Worth, Texas, from spring 1896 until Dec. 1st, 1896.

Q. 10. What ailments, diseases, illness, weakness, infirmities, disabilities, or injuries had deceased had prior to last illness? (State facts fully, giving dates)

A. 10. Little catarrh when he had cold.

Q. 11*a*. State explicitly habits of deceased, with reference to the use of spirituous, malt, or fermented liquors.

A. 11*a*. Never used any.

Q. *b*. Do you know from knowledge or information that deceased ever used such liquors to the extent of intoxication?

A. *b*. No.

Q. *c*. To your knowledge or information, did the deceased at any time use opium, morphine, chloral, or other narcotics? If so, give full particulars.

A. *c*. No.

Q. 12*a*. Had deceased, at any time, been an inmate of a hospital, asylum, sanitarium, home or health resort of any kind? If so, give date, place and full particulars.

A. 12*a*. No.

Q. *b*. Had deceased, at any time, received a pension from any government, or benefits from any accident or health insurance company, or beneficial society? If so, give date and full particulars.

A. *b*. No.

Q. 13. Was the death of deceased, in any degree, caused by his own hand or acts?

A. 13. Don't know.

586 Q. 14. In case of coroner's inquest, furnish association with the verdict of the jury, and all the evidence on which such verdict was based.

A. 14. No inquest.

Q. 15. Did any of the deceased's relatives, or ancestors, ever have insanity, consumption, paralysis, apoplexy, lung disease, epilepsy, or any hereditary disease? If so, state which disease, relative and when.

A. 15. No.

Q. 16. Had the deceased, within the past seven years, used any patent or proprietary medicine? If so, when and what?

A. 16. Not that I know of.

Q. 17. In what other companies or societies, and to what amount in each was life of deceased insured? Give dates of policies.

A. 17. No other.

Q. 18*a*. In what capacity, or by what title, do you make the claim?

A. 18*a*. As beneficiary & sister.

Q. *b*. Are you legally entitled to receive the entire amount payable on the policy?

A. *b*. Yes.

NOTE.—The word his was erased and the word my substituted in the answer to the 6th question before signing.

Having been duly sworn, I hereby depose and say, that the answers to the above questions are true, and the statements therein contained true and full, to the best of my knowledge and belief.

Witness my hand this 18th day of January 1897.

(Signed) JENNIE M. METTLER.

STATE OF TEXAS, County of Reeves, } *ss*:

On this, 18th, day of January A. D. 1897, personally appeared before me the above named Jennie M. Mettler to me know, and made oath that the foregoing statements made by her are true and full, to the best of her knowledge, recollection and belief.

(Signed) J. B. GIBSON,

[SEAL.] Clerk County Court, Reeves County, Tex.

587 Received Feb. 2, 1897.

Ans. by ——.

Supplementary Proof of Loss Submitted by the Fidelity Mutual Life Association under Policies Nos. 73372–3 and 4.

Claimant's Supplementary Affidavit No. 3.

(1.) If insured W. A. Hunter's body were to be found clad just as it was the last time you saw him, but the body be so decomposed that it could not be recognized, how would you identify it? In fact, could you identify it, if so how? State fully.

I would know him by his watch and chain and his clothes. He wore a fine, nicely lined overcoat, soft finish, costing $25.00, it was black. He wore a black coat & vest. His pants were of heavy goods all black ridged. He had a white laund-ryed shirt with collar & cuffs black tie, & a blue gingham shirt over the white shirt. Wore a plain calf skin shoe laced (nice shoes).

(5.) Describe the horses and wagon he left Pecos with.

The wagon looked old paint nearly worn off, had a spring seat, one horse was dark brown branded H on left thigh, owned by me. The other was a larger bay horse, owned by Emerson Powers.

(7.) From whom did you get said horses and when?

I got the Powers horse from Mrs. Manning & her son Mount who were on Mr. Powers' place at that time. This was Dec. 2nd, 1896. The other horse I have owned since my husband's death, March 20th, 1896.

(8.) Where did you keep said horses for the last six months?

The smaller horse was running on the range until Nov. 29th or 30th, 1896, when he was brought in town at my request. The Powers horse was on his place.

(9.) What was the financial ability of W. A. Hunter on the 28th of Oct., 1896?

He had no real estate of my knowledge but his claim to the section of land in Loving Co., Tex., a $270 note of R. H. Paschal, on which about $90 had been paid. This is all the property I
588 knew of his having except he held notes against my husband, L. Mettler, for $556 80/100 & one note against my brother, C. R. Hunter, for $240.00 all of which was borrowed money. Also about $1500.00 Loving Co. script & one account against the State for collecting taxes.

(14.) When did the said Hunter (insured) first mention to you the subject of insuring his life and where?

In January 1896 in Mentone, Loving Co. Texas.

(15.) When did he first tell you that he had taken out the policies in question? And where?

He never told me.

(18.) When did he leave Mentone? And where did he go to from there?

Spring of 1896 & went to Ft. Worth, Texas.

(19.) Where is insured W. A. Hunter at the present time? Is he dead or alive?

He is dead.

(21.) When did insured tell you he held a note against one Paschall a former resident of Quanah? When did he tell you about it and where did he tell you you could find it?

I have known he had it ever since the note was made in 1891 or 1892. When he was back in Pecos I asked him if Paschal ever paid his note & he said No, that he had placed it in the bank at Gainesville for collection.

(23.) Whom did you or he get to go and get said Powers horse? And when did you or he get said person to go for said horse?

Insured and I went together on Dec. 2nd, 1896 & got the horse & wagon.

(30.) How far is the section from Pecos river and in what direction?

The river was about 2½ miles west from his section.

(31.) What is the number of said section of land, and what improvements *has* been made thereon?

No. 46. No improvements have been made as yet.

589 Subscribed and sworn to before me, this 22nd day of January, A. D. 1897.

(Signed) J. B. GIBSON,
[SEAL.] Clerk Co. Court, Reeves Co.; Texas.

THE STATE OF TEXAS, }
County of Reeves. }

I, J. B. Gibson, clerk of the county court of Reeves Co., Texas, do hereby certify that the words, viz: "Also about $1500.00 Loving County scrip, and an account against the State for collecting taxes," on the margin of page No. 2 of the foregoing instrument in writing were placed there at the request of the affiant, Mrs. Mettler, before she signed and swore to the same. I further certify that affiant stated that the amount of the account against the State for collecting taxes was $70.00 or $80.00. I further certify that I read each and every question in said instrument contained, to affiant, and each answer, and when affiant suggested a change I made it to suit her. Witness my hand and seal this 22nd day of Jan. A. D. 1897.

(Signed) J. B. GIBSON,
[SEAL.] Co. Cl'k, R. Co., Tex.

Endorsed as follows on back: Proofs of death. Supplemental affidavit of claimant.

590 STATE OF TENNESSEE:

Pleas at the court house in the city of Nashville, county of Davidson and State aforesaid, on the first Monday, being the sixth day, of March in the year of our Lord one thousand eight hundred and ninety nine, and the 123rd year of our American Independence.

Present: The Hon. Jno. W. Childress, one of the judges of the State of Tennessee, and assigned to hold the second circuit court of Davidson county, Tennessee.

J. I. & A. W. Newsom in Account with W. A. Hunt, of Brookside, Ala., Partners, Trading as Grand View Nursery Co. of Flatrock, Tennessee:

Feb'y	4.	Dinner (Jackson)	$ .25
		R. R. fare from Atlanta to Canton	13.15
		Expenses from Atlanta	1.00
		Expenses week ending 2/12	2.00
		" " " 2/19	5.35
		" " " 2/26	1.50
March.	—.	" " " 3/5	2.25
		" " " 3/12	1.75
		" " " 3/19	1.00
		Expenses Edinburg to Starkville 3/19	201.75
		Expenses week ending 3/26	3.40
		Expenses Starkville to Macon 4/2	.25
April	7.	Expense country Macon	3.00
		Expenses home	1.00
		Exp. bus for Macon	.25
		" buggy washers	.25
		R'y fare home	10.00
		Time worked 53 days	101.90
591			$150.05
February	7.	Cash rec'd (C. A. Newsom)	$5.00
"	13.	" " "	5.00
"	18.	" " Robinson	5.00
"	26.	" " "	2.50
Mar.	5.	"	2.50
"	28.	"	3.00
April	7.	"	25.15
"	7.	on salary	4.85
Check for balance of spring salary			46.10
Forward			99.10
Balance of fall salary as per settlement statement due Dec. 1st, 1898			50.95
Total			150.05
Balance due December 1st, 1898			50.95

STATE OF ALABAMA, }
Jefferson County. }

Personally appear-d before me, Joseph R. Tate, a notary public in and for State and county, duly commissioned, authorized and qualified according to law, W. A. Hunt, who being duly sworn by me, deposes and says — J. I. & A. W. Newsom is correct and unpaid: that there are no other credits to be given on said account; that said account is for work and labor done and performed for the said J. I. and A. W. Newsom, partners, trading as Grand View nurseries, by the said W. A. Hunt, that the said J. I. & A. W. Newsom *is* justly indebted to W. A. Hunt in the sum of fifty and 95/100 dollars, together with interest and charges.

W. A. HUNT.

Sworn to and subscribed before me, this 17 day of July, 1899.

JOSEPH R. TATE,
Notary Public. [SEAL.]

Fee 50 cents.

My commission as notary public expires on the 18th day of December, 1900.

JOSEPH R. TATE, N. P.

592 Magistrate's Warrant.

STATE OF TENNESSEE, }
Davidson County. }

To any lawful officer within said county:

You are hereby commanded to summon J. I. Newsom and A. W. Newsom, partners trading under the style and firm name of Grandview Nursery Company, to personally appear before me, or some other acting justice of the peace for said county, to answer the complaint of W. A. Hunt, in a plea of debt due by account, coming from a foreign State, proven $50.95—under $500.00.

Given under my hand and seal, this 24th day of July, 1899.

PETER HARRIS, JR., [SEAL.]
Justice of the Peace.

Issued 24th July, 1899.
E. A. DODD, J. P.

Came to hand same day issued, and executed by reading the within warrant to A. W. Newsom, J. J. Newsom, and citing them to appear before E. A. Dodd, justice of the peace, for trial the 29th day of July, 1899, at one o'clock, p. m.

J. H. HARRIMAN, Constable.

W. A. HUNT
vs.
J. I. & A. W. NEWSOM.

Judgment for the plaintiff against the defendant- for fifty and 96/100 dollars and cost of suit and interest at the rate of 6 per cent., for which execution may issue.

This the 29th day of July, 1899.

E. A. DODD, J. P. [SEAL.]

Appeal prayed and granted to the circuit court.
Filed October 30th, 1899.

PHILLIP J. OBRIEN, D. C.

W. A. HUNT
vs.
J. I. & A. W. NEWSOM. } Recoupment.

593 The defendants for plea say that the consideration which is the basis of the plaintiff's action is for a balance due him on his salary agreed to be paid to him by the defendants for soliciting and taking orders for fruit trees during the year 1898. The plaintiff in consideration of his said salary agreed to take orders only from responsible men financially, and to report no order- to the defendants which were not given by a man or person out of whom the money could be made. Plaintiff further agreed in consideration of his salary to make special inquiries from those who knew the financial standing of each party who gave an order for trees, etc., and ascertain whether or not they were responsible for their contracts, and to send in no orders which were not on good and responsible men. The defendants say the plaintiff breached his said contract and agreement in this, he took orders for irresponsible parties and sent the same in to be filled by defendants, and falsely representing in each case that the parties were good and responsible, and caused the defendants to ship the trees, prepay freight, and pay the expenses and salaries of men to try to make deliveries which they were unable to do. And the plaintiff well knew at the time he took said orders and sent them to defendants, or could have known by making such inquiries as he agreed to make with reference to their financial standing, that they had no use for trees and shrub-ry and were totally unable to pay for them, and totally irresponsible for their contracts, and were not such men as he represented them to be. Wherefore defendants say they have been damaged by reason of said breaches and fraudulent misrepresentation in the sum of $499.00, for which they pray judgment, and that the same be set off against plaintiff's demand.

Filed August 1st, 1899.

E. A. DODD, J. P.

594 Organization.

THE STATE OF ALABAMA, }
Jefferson County. }

Be it remembered that at a term of the city court of Birmingham, begun and held for the county of Jefferson and State of Alabama, in the city court of Birmingham, on the first Monday in October, in the year of our Lord nineteen hundred and two and of the Independence of the United States of America, the 127th year; present and presiding the Honorables Wm. W. Wilkerson, senior judge and Chas. A. Senn, associate judge of said court; also present, John S. Gillespy, clerk and register of said court, and Andrew W. Burgin, sheriff of said county, the following proceedings were had and done, to-wit:—

Petition.

STATE OF ALABAMA, }
Jefferson County. }

To the Honorable Chas. A. Senn, of the city court of Birmingham:

Your petitioner William A. Hunt, respectfully represents unto your honor, as follows:

1. That he is imprisoned in the county jail of Jefferson county, Alabama by Andrew W. Burgin, sheriff of said county on a charge of being a fugitive from justice from the State of Texas, Reeves county on the charge of swindling by obtaining an insurance policy with the intent to defraud the Fidelity Mutual Life Insurance Company of Philadelphia Pennsylvania, on a warrant for said offense issued out of the justice court of I. H. Benners a copy of which warrant is hereto attached.

2. Your petitioner further represents that the crime with which he is charged was a crime not actually committed within the jurisdiction of the State of Texas and that petitioner has not fled therefrom, that the petitioner is in no sense a fugitive from justice
595 and that the crime with which he is charged is a crime committed against the Fidelity Mutual Life Insurance Company whose residence and domicile is in the State of Pennsylvania and that your petitioner has not — in the State of Pennsylvania or the State of Texas since said alleged crime was committed and that petitioner is not the identical person who committed such crime alleged to have been committed and for which petitioner is held.

The premises considered, petitioner prays that a writ of *habeas corpus* may be issued directed to the said Andrew W. Burgin, commanding him to bring the body of petitioner before your honor, at such time and place as may be appointed, together with the cause

of petitioner's detention, then and there to do and receive wh
should be considered concerning him.

Witness my hand this 2nd day of May, 1903.

W. A. HUNT

Sworn to and subscribed before me on this the 2nd day of M
1903.

ROLAND T. SHUGART,
Notary Public

THE STATE OF ALABAMA, }
Jefferson County. }

The Criminal Court of Jefferson County.

Personally appeared before me I. H. Benners, a justice of
peace in and for said county R. C. Milliken who being duly swo
says that William A. Hunter, alias William Hunt within twe
months before making this affidavit in said county is a fugitive fr
justice from the State of Texas Reeves county on the charge
swindling by obtaining an insurance policy with intent to defr
the Fidelity Mutual Life Insurance Company of Philadelphia
against the peace and dignity of the State of Alabama.

R. C. MILLIKEN

Subscribed and sworn to before me this 27 day of April, 1903.

I. H. BENNERS, J. P

Warrant of Arrest.

THE STATE OF ALABAMA, }
Jefferson County. }

To any lawful officer of said county, Greeting:

596 You are hereby commanded to arrest William A. Hun
alias William Hunt and bring him before the *me* court
Jefferson county, at the instanter term of said court to answer
State of Alabama of a charge of fugitives from justice from
State of Texas county of Reeves preferred by R. C. Milliken.

Witness my hand this the 27th day of April, 1903.

I. H. BENNER, J. P

Witness for State R. C. Milliken.

(On the back of the above warrant of arrest appears the foll
ing)—

THE STATE OF ALABAMA,
Jefferson County.

THE STATE
vs.
WILLIAM HUNTER, alias WILLIAM HUNT.

Warrant of Arrest.

The officer arresting may admit the defendant to bail upon his entering into bond in the sum of ten thousand dollars with two good securities approved by said officer.

I. H. BENNERS, J. P.

May 6.

STATE OF ALABAMA,
Jefferson County.

To the sheriff of Jefferson county, Alabama:

You are hereby commanded to have the body of William A. Hunt alleged to be detained by you, by whatsoever name the said William A. Hunt is called or charged, with the cause of such situation, before Chas. A. Senn, judge of the city court of Birmingham on 4 day of May, 1903, at 2 o'clock p. m. at the place of holding said court to do and receive what shall then and there be considered concerning the said William A. Hunt.

Dated this the 2 day of May, 1903.

597

CHAS. A. SENN,
Judge of City Court of Birmingham.

Executed by producing the body of the said William A. Hunt before the Hon. C. A. Senn, judge of the city court of Birmingham, at the time and place named in said writ and show as cause of his detention a warrant issued by the justice court of I. H. Benners, charging the defendant with being a fugitive from justice.

May 4th, 1903, 6.30 p. m. May 2nd.

ANDREW W. BURGIN, Sheriff.

May 4th, 1903.—Cont'd to May 5th 1903 at 2 p. m.

CHAS. A. SENN, Judge.

May 5th, 1903.—Cont'd to May 6th at 2 p. m.

CHAS. A. SENN, Judge.

Received May 2 6:20 p. m. 1903.

ANDREW W. BURGIN, Sheriff.

In the City Court of Birmingham.

Ex Parte WILLIAM A. HUNT on Application for *Habeas Corpus.*

Before the Hon. Chas. A. Senn, Judge of said Court.

Now on this the 6th day of May, 1903, comes the said petitioner and after amendment of the return of Andrew W. Burgin sheriff and by leave of the court first had amends said petitioner and avers that he is restrained of his liberty in violation of law, in that it appears that the petitioner is restrained upon a warrant charging no crime or offense known to law—that it appears that petitioner herein is charged with "swindling" in the State of Texas" and which said "swindling" was done in the State of Texas—that it nowhere appears that petitioner was personally present in the State of Texas when said "swindling" was done; that the papers accompanying the demand of the governor of Texas on the governor of Alabama are not authenticated by the act authorizing extradition—and petitioner was not within the limits of the State of Texas when said swindling is alleged to have been done and committed no act therein before that time tending to connect him therewith, and did not flee from the justice of said State.

WILLIAM A. HUNT.

598 Sworn to and subscribed before me this 6th day of May, 1903.

H. C. MILLER,
Deputy Clerk and Register of the
City Court of Birmingham.

Ex Parte WILLIAM A. HUNTER.

The petition of William A. Hunter, alleging that he is illegally restrained of his liberty, coming on now to be heard, on the petition the return to the petition of Andrew W. Burgin, as sheriff of Jefferson county, Alabama, and his amended return, and the evidence adduced, the judge is of the opinion that the petitioner is not illegally restrained of his liberty.

It is therefore, ordered, that the petitioner be remanded to the custody of the said Andrew W. Burgin, as sheriff of Jefferson county, Alabama.

And questions of law having arisen in the trial of said proceedings, which were reserved by the petitioner and it having been made known to me that petitioner desires to take an appeal to the supreme court of Alabama, said appeal is hereby granted—and the said Andrew W. Burgin, as such sheriff, is directed to hold the said William A. Hunter in his custody until the said appeal is heard and determined, or until further ordered by the judge.

CHAS. A. SENN, Judge.

May 9th, 1903.

Ex Parte WILLIAM A. HUNT.

On the Petitioner for *Habeas Corpus* Before the Hon. Chas. A. Senn, Judge of the City Court of Birmingham, Alabama.

And now comes Andrew W. Burgin, sheriff of Jefferson county, Alabama, to whom said writ of *habeas corpus* was directed, and amends the return heretofore made by him, by showing that the said William A. Hunt is held in custody under and by virtue of a warrant of arrest issued by I. H. Benners, a justice of the peace in and for Jefferson county, Alabama, and also under and by
599 virtue of a warrant of arrest issued by W. D. Jelks, as governor of Alabama, which last mentioned warrant of arrest came into my hands, as such sheriff, on the 5th day of May, 1903.

A copy of said warrant of arrest issued by said I. H. Benners, as such justice of the peace, is in words and figures as follows, to-wit:

"THE STATE OF ALABAMA,
"Jefferson County.

"To any lawful officer of said county, Greeting:

"You are hereby commanded to arrest William A. Hunter, alias William Hunt, and bring him before me, at the instanter term of said court, to answer the State of Alabama, of a charge of fugitive from justice from the State of Texas, county of Reeves, preferred by R. C. Milliken.

"Witness my hand this 27 day of April, 1903.

"I. H. BENNERS, J. P."

A copy of said warrant of arrest issued by W. D. Jelks, as governor of the State of Alabama, is in words and figures as follows to-wit:—

"In the name and by the authority of the State of Alabama.

"I, Wm. D. Jelks, governor of the State, to any sheriff, coroner, or other officer authorized by law to make arrests, sent greeting:

"Whereas, his e-cellency, S. W. T. Lanham, governor of the State of Texas, by requisition dated the 2nd day of May, 1903, has demanded of me, as governor of the State of Alabama, the surrender of William A. Hunter, alias William A. Hunt, who, it appears, is charged by affidavit, in the county of Dallas, in said State, with the crime of swindling, (duly certified copy of which affidavit accompanies said requisition,) and it appearing that said William A. Hunter alias William A. Hunt, has fled from justice in said State and taken refuge in the State of Alabama.

"Now, therefore, I, Wm. D. Jelks, governor of the State of Alabama in obedience to the Constitution and laws of the United States

and the laws of the State of Alabama, do command you to
600 arrest the said William A. Hunter, alias William A. Hunt, if he be found within the limits of this State, and to deliver him into the custody of J. Roll Johnson, the duly authorized agent of the State of Texas.

"And of the execution of this warrant you will make due return to me.

"In testimony whereof, I have hereunto set my hand and caused the great seal of the State to be affixed at the capitol, in the city of Montgomery, this 4th day of May, in the year of our Lord one thousand nine hundred and three, and in the one hundred and twenty-seventh year of American Independence.

"W. D. JELKS,
[SEAL.] Governor of Alabama."

"By the governor.
"J. THOS. HEFLIN,
"Secretary of State.

And I herewith produce the body of the said William A. Hunt, in obedience to the terms of said writ.

Witness my hand, this 5th day of May, 1903.

ANDREW W. BURGIN,
Sheriff of Jefferson County, Alabama.

In the City Court of Birmingham.

Ex Parte WILLIAM A. HUNT.

Now comes William A. Hunt and upon the return of the sheriff, Andrew W. Burgin, sheriff of Jefferson county, Alabama, says:—

First. That the warrant of I. H. Benners J. P. made an exhibit and part of said return is void and issued without charging petitioner with treason, felony or other crime.

Second. Said warrant was *functus officio* and without authority of law at the time of making said return.

Third. That said warrant was no authority to the sheriff to commit petitioner to jail.

601 Fourth. That said warrant was issued and said commitment was made in violation of law.

Fifth. That said warrant does not authorize petitioner's imprisonment without bail.

Sixth. That the warrant to which the name of W. D. Jelks, governor of Alabama, is attached and set out in the said sheriff's return is void in that it charges the petitioner with no crime known to the law.

Seventh. That said warrant to which the name of W. D. Jelks, governor of Alabama is attached does not purport to have been issued

by the governor of Alabama but by the secretary of state—the Hon J. Thos. H-flinn, and is not a valid warrant.

Eighth. That said warrant alleged to be the warrant of W. D. Jelks, governor of Alabama, is for the arrest and delivery of William A. Hunter alias William A. Hunt a fugitive from justice of the State of Texas—the petitioner denies that he is a fugitive from the justice of the State of Texas or that he committed any offense therein.

Ninth. That said warrant fails to show that the complaint upon which the requisition was made and the governor's warrant issued was "certified to the governor of Alabama by the governor of Texas as authentic."

Tenth. That said governor's of Alabama warrant was issued without authority of law.

Eleventh. That the complaint upon which the said governor W. D. Jelks issued his warrant for petitioner's arrest was not an exemplified copy of an indictment found or other judicial proceeding had against petitioner in the State of Texas.

Twelfth. That the warrant of arrest issued by the governor of Alabama, was not a warrant for the arrest of petitioner, and charged the petitioner with no offense, that it was issued without having been first requested and without having a copy of an indictment or affidavit charging petitioner with an offense certified or authentic by the governor of the State of Texas.

602 Thirteenth. That said warrant fails to show when petitioner is alleged to have fled the State and when the offense was committed if committed at all and when complaint was made that an offense had been committed.

And now having mentioned and set forth the foregoing specifications of the insufficiency of the return, petitioner denying the sheriff's right to hold him, prays the court that each material part of said return be considered as traversed by petitioner and said specifications be heard and considered by your honor and that the said sheriff, Andrew W. Burgin, be required to establish fully and legally his right to detain petitioner without other process or else discharge him from his custody. And if your honor should hold that said Burgin is justified therein, that your honor will fix the amount and condition of bail and grant him the right of appeal from said order and judgment as provided by law.

(Sec. 4314 Code)

WILLIAM A. HUNT.

Sworn to and subscribed before me this the 6th day of May, 1903.

H. C. MILLER,
Deputy Clerk and Register of the
City Court of Birmingham.

Ex Parte WILLIAM A. HUNT.

Before the Hon. Chas. A. Senn, Judge of the City Court of Birmingham, Jefferson County, Alabama

Now comes William A. Hunt and makes know- to the court by this affidavit. That his name is William A. Hunt and that he is a *bona fide* resident citizen of Jefferson county, Alabama—that he is not a citizen of the State of Texas and is not guilty of any crime committed either by himself or with another in the State of Texas that he was not present within the limits of said State, when any alleged swindling was committed or done, that if there be such a crime as swindling plaintiff is not so advised and therefore denies that there is such a crime. That if a crime of swindling was committed in the State of Texas as alleged it was by some person
603 other than this petitioner and while he was without the limits of the State of Texas and beyond its jurisdiction and without his consent.

WILLIAM A. HUNT.

Sworn to and subscribed before me this 6th day of May, 1903.

H. C. MILLER,
Deputy Clerk and Register of the
City Court of Birmingham.

THE STATE OF ALABAMA, }
Jefferson County. }

I, John S. Gillespy, clerk and register of the city court of Birmingham, in and for said State and county, do hereby certify that the foregoing pages numbered from one to ten inclusive, contain a full, true and correct copy and exemplification of the record of the cause of *Ex parte* William Hunter alias William Hunt as appears of record in said court.

Witness my hand and seal of said court, this 5th day of December, 1903.

(Signed) JOHN S. GILLESPY,
[SEAL.] Clerk and Register.

THE STATE OF ALABAMA, }
Jefferson County. }

I, Chas. A. Senn, senior judge of the city court of Birmingham, do hereby certify that John S. Gillespy, whose name is signed to the preceding certificate of exemplification, is the clerk and register of said city court of Birmingham, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said exemplification is the seal of said

city court of Birmingham, and that the attestation thereof is in due form of law.

This 5th day of December, 1903.

(Signed) CHAS. A. SENN,
Judge of the City Court of Birmingham.

604 THE STATE OF ALABAMA, }
Jefferson County. }

I, John S. Gillespy, clerk and register of the city court of Birmingham, in and for said county and State, do hereby certify that Hon. Chas. A. Senn, whose name is signed to the foregoing certificate, is the senior judge of the city court of Birmingham, duly elected and sworn, and that the signature of said judge is genuine.

In witness whereof, I have hereto set my hand and affixed the seal of said court, this 5th day of December, 1903.

(Signed) JOHN S. GILLESPY,
[SEAL.] Clerk and Register.

605 In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Summer Term, A. D. 1900.

JENNIE M. METTLER
versus } No. 2118.
THE FIDELITY MUTUAL LIFE ASSOCIATION.

Be it remembered, that at the May term of the United States circuit court for the northern district of Texas, held at Dallas, in the court room, thereof there was present and presiding Hon. Edward R. Meek, district judge, on the 28th, 29th, and 30th days of May, and the 1st, and 2nd days of June 1900 and the following proceedings were had in the case of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association.

Defendant presented exceptions to the 9th count of plaintiff's first amended original petition, filed in said cause on the 11th day of November, 1899, which count is as follows, to-wit:

"Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest and damages due plaintiff by defendant, on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon

defendant for failing to pay the loss within the time specified
606 in the policies, was first enacted by the legislature of Texas on M-y 3rd, 1874; it was carried into the Revised Statutes of 1869; and again into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be valid. Plaintiff shows that the policies sued on were issued October 31st, 1896, after *siad* statute of 1895 went into effect; that the defendant as a foreign corporation. Was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed, and was when it issued said policies, obligated to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas; whereby it became bound and is liable to plaintiff for *siad* twelve per cent. damages and reasonable attorneys' fees. Plaintiff shows that it appeared to the legislative mind of the State of Texas that the life insurance business as conducted and carried on in the State by such corporations, was detrimental to the welfare of its people, and as the State had a right to do by the exercise of its police power, it prescribes said provisions of the law of 1895, as a part of defendant's contract herein; whereby defendant became bound and liable to plaintiff for said twelve per cent. damages and attorneys' fees."

The demurrer and exception of defendant to said 9th count are contained in defendant's second amended original answer filed in said cause on the 28th day of May 1900, and is as follows;

"Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorneys' fees and statutory damages in this action, because such attorneys' fees and damages are asserted and claimed under the statute of the State of Texas, which is in violation of section, 1, article 14, of the Constitution of the United States, as well as other provisions of said
Constitution and provisions of the constitution of the State
607 of Texas, and therefore void,"

The court then and there overruled said exceptions, to which defendant then and there, to wit: on the 28th day of May 1900, excepted.

Whereupon, both parties announced ready for trial, and the plaintiff to sustain her issue, offered the following evidence, and the further proceedings were thereupon had: Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs are sufficient, and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition, and whether he died in the manner and form as alleged therein. There upon the court sustained special exceptions C. D. E. & F. of defendant to plaintiff's amended petition.

Plaintiff offered in evidence the three insurance policies sued

upon, numbered respectively—D–73372, D–73373, and D–73374, for $5000.00 each. Each of said policies bears the same date, is for the same amount, issued by defendant to the deceased, W. A. Hunter, and is upon the same terms and conditions, and by agreement, only one of which is copied into this record. (Attach one policy.)

Copy of policy here.

608 Thereupon on the same day, May 28, 1900, Mrs. JENNIE M. METTLER, the plaintiff, being sworn, testified orally as follows:

"I am the Jennie M. Mettler named in the three policies of insurance sued upon. I have examined said policies. I am the sister of William A. Hunter named in them. At the date of their issuance, October 31st, I lived at Pecos, Texas."

"The home of my brother, W. A. Hunter, would be in Loving county, or Pecos; his home was out in the West usually with me, at Pecos."

"I had no children. My husband died in March 1896. W. A. Hunter was not married in 1896. He was about 33 yrs. old. He was born near Homer, Licking county, Ohio. I came to Texas in the spring of 1886, and W. A. Hunter came either the latter part of 1885 or 1st of 1886. He continued to live here after coming in 1886. My father lived in Homer, Ohio, and has always lived there; has lived there 50 yrs. There were nine children of us. Six lived at Homer and in that vicinity. There are four girls and two boys. Three of the girls are married; none of the boys are married.

"The last time I saw W. A. Hunter was the 3rd day of December 1896, in Pecos. From the time he came out to Pecos—he had been in Ft. Worth; he came out to Pecos to go to Mentone, in Loving county, expecting to make proof of his section of land in that county. He had occupied his land for three years, and he was going up there to fix it up, and to make final proof of occupancy; and he had some little bit of lumber up there and he was going to gather it up; he came to Pecos and got one horse which belonged to me, and a wagon and horse—it was stuff I had left when I lived at Mentone myself; it was my husband's; he gathered these things up, took some provisions for himself and team, and started out there for that purpose, and expected to be gone about a week or ten days. He was only going to stay there a while and gather up things, and then he wanted me to come and stay with him awhile. He took some baled hay
609 for the horses, in the wagon, and some provisions for himself in the shape of flour, lard, sugar, coffee, some canned goods, took his bed, and a stove, and a few cooking utensils, enough for a camping outfit, a gun and a lantern, etc. The horse that belonged to me which he took on this trip I had it brought into Pecos; the other horse he got about a mile out of town at the Powers' place. Some of the provisions which he took I had on hand. The stuff I had saved, and the rest that I did not have he bought in Pecos.

Bought his baled hay at the livery stable. He left Pecos awhile before dinner—about 11 o'clock. On that day, prior to his leaving Pecos, he was there in Pecos—I suppose around about town. He was up to see me. He said he would be gone on this trip a week or ten days. After he had been gone ten days and did not come back, and then two weeks and did not come back—there was about fifteen days I did not hear anything from him, and I thought I ought to hear something from him in some way, shape or form, and I sent a man out there to see if he was there, and look for him, and see why he did not come back. This man's name was "Baird," who lived at Pecos; at least, he was there when I hired him. I hired him to go up there. He said he went and did not see any evidence of his having been there at all. A few days later I sent Mr. Henry Slack, and he came back and told me he did not find any evidence of his having been there. After this I met Mr. Gibson, district and county clerk of Reeves county, on the street. He got up a little pa-ty and they went up the river and found his camp, the wagon and cooking things, and one horse that was dead, and the other horse was gone. Mr. Mansfield and Mr. Tulk went with Mr. Gibson. Afterwards I went up myself with Mr. Johnson and his wife and little boy. When Mr. Gibson came back he reported to me what they had found. Then Mr. Johnson and others with me went up to the camp. Found a wagon and a bed on the ground, cooking utensils, where
610 there had been a little fire made, a gun leaning against the wagon wheel. The skillet or oven had been used. When he left home with it it was clean. Meat had been fried in it. We found some little feed left in the wagon—the horse feed, and some provisions. I gave him a loaf of bread when he left, already baked, and he had used half of the bread. There was a can, looked like he had made coffee in it, and he had opened a can of tomatoes, and his bed was made down. A tarpaulin had been laid on the ground, and the bed comforts and quilts lying next, and over the top of that was the tarpaulin sp-ead, end of it was turned up. A tarpaulin is made of real heavy material. Campers use it to keep the moisture from bed clothes. It is real heavy like duck, of tent stuff. The bed was in a shape that somebody had slept in it and laid the cover back, and the imprint was there like the dampness and night atmosphere had assumed that kind of shape, just the shape of some one lying there. My horse was at the camp dead. The other horse was not there. There was hay scattered around the wagon, looked like some horse had been eating it. We found my brother's tracks going from the wagon to a point in the river where he had gone to get water—the buckets were there. I know my brother's shoe-tracks. These parties up there on the day before had made some tracks aronnd there in other parts, though they had been careful. Mr. Gibson was along and pointed out the tracks to me. We first followed the tracks from the river to the camp, and from the camp down to a little place in the river—kind of broken off place; it formed a kind of peninsula. There was the print of a bucket—looked

like the bucket had been drawn up and set down on the bank. The buckets looked like water had been in them and gradually evaporated, and there was sand in the bottom of the buckets. Then there was a foot-print where he went to the edge of the bank, and this foot-
print never returned. The bank of the river where the
611 tracks went and never returned is sandy. It was almost
perpendicular; it was a little slanting; I think it would be eight or nine feet, as near as I can make an estimate; it looked that way to me. The current of the river was swift, and swished up against the bank the day I was out. The river was quite wide at that place. Where the tracks went to the river and did not return, there were some dry mesquite roots that were sticking up from the edge of the bank. These mesquite roots had grown out—part of them seemed to be lying on top of the ground; the root had been broken off, and did not look like it had been broken long. The foot-prints were set in the ground, showing plainly that he had been breaking wood. The two foot-prints were near together, one a little in advance of the other. The ground is all of a loose sandy soil. They measured the distance that the foot-prints were from the edge of the river bank, and they said it was about 18 inches. I would say 16 or 18 inches. The two tracks last described were deeper in the soil than the others. Where these two tracks were the surface of the ground sloped off gently, just a little bit; probably a slope of 8 inches. I do not know; just a little slope came off to the edge of the river; just a little bit of the bank was broken off. Straight down from where the foot-prints were there was some loose dirt.

My brother had an over-coat; did not find it at the camp. Did not find his hat. He could not swim.

My husband first went out on the Pecos in 1893. I have known something of the Pecos ever since. I have been to Mentone, but went on the train.

At the time my brother left Pecos he was perfectly well. His mental condition was all right. In my opinion he was above the average for intelligence. He had no personal or financial matters pressing upon his mind that I know of. He was of a cheerful dis-
position and kind; had a good disposition.
612 "My husband left no life insurance. He left me without
anything at all. Left me in debt. I have been supporting myself ever since his death.

"Q. State what is the general reputation in the family—your father, brothers and sisters—as to the death of your brother, W. A. Hunter?"

To which defendant objected because it is incompetent and hearsay. 2. Family reputation can not establish or prove death, especially where it is 1500 miles away. 3. It is competent for no purpose, especially when that reputation has been established since the institution of this cause of action.

Which objection the court overruled, and said: "I think the

question is one of weight to be given the evidence. It is a question for the jury to say whether or not family belief tends to prove his death."

To which ruling the defendant then and there excepted for the reasons stated in the objection, and the witness thereupon testified:

"My father, brothers and sisters—all believed my brother to be dead."

Witness further testified over the same objections made by defendant, which objections were overruled by the court, and then and there excepted to by defendant—"That the family believed he was drowned in the Pecos river, out in the West, and that this family belief has existed ever since I wrote them about it."

Witness was here handed a letter which she recognized as written by herself, and addressed to her father, dated December 30, 1896.

"I think I wrote it the day that I came back from the camp, from where we found my brother's camping outfit."

Court adjourned until 10 o'clock Tuesday morning, May
613 29th, when the following testimony was adduced: plaintiff on witness stand:

"I reported that my brother was dead. I know he wrote to and received some letters from the family. The very best relations existed between my father and brother. Never was any disagreement between them. The very closest of friendship existed between my brother and me; brotherly and sisterly love.

"In November, 1896 he was in the real estate and farming business. That was all he had been doing to amount to anything. The land was situated in Loving county."

Picture was handed to the witness which she identified was that of her brother, W. A. Hunter, and said:

"It must have been taken about six years ago. I have had it quite awhile. It was taken prior to October 1896. It is a splendid likeness. The last one is a little older and a little more bald on the top of the head; otherwise it looks just like him."

Another picture was handed to the witness which she identified as the last picture taken that she knew of and said that the last one was the better likeness; which two pictures were offered in evidence as the pictures of W. A. Hunter, and marked Exhibit.

"I first learned of the insurance policies a week or ten days after the party had found the camp up the river. I went to Mr. Gage's first to talk to him about some matters. Mr. Gage is a lawyer and also an officer in the bank. He had his law office in the bank building. I had a note I wanted to know what to do with. I did not know how to proceed to collect it, or whether I could or not, and I wanted to ask Mr. Gage's advice. He then told me there were some papers in the office. He told me what to do about the note and said: By the way, there are some papers in the vault of the bank that my brother left with him. He went and got the papers

and opened them, and they were the insurance policies. That was the first I knew of the policies."

614 A paper was handed to the witness who said it looked like the script that she found, and that it has her brother's name on it, and is county script of Loving county.

On cross-examination, witness said:

"When my brother came to Texas he did not locate anywhere. He stopped at Ft. Worth the first I knew of. I didn't come to Texas until March afterwards. I found my brother in Ft. Worth. Do not remember what he was doing. I did not remain there at all. He came to my house afterwards and said he was there. He came to Itasca to see me, and said he was in Fort Worth, and corresponded with me from there. I was located in Itasca the first summer I was in Texas. I don't know when my brother left Ft. Worth. He taught a term of school out at a little place named Crowley, in the winter of 1887. I think he was book-keeper for Mr. Morgan at Alvarado the following year, which would be in 1888. Think he was with Morgan in 1889; do not know whether it was 1890 or '91 that he went to Quanah, Hardeman county, Texas; think it was '90, but am not certain. He and my husband had an office there together. I went on in October. I was there a year and a half, and he was there all that time. I left him there when I moved away. Cannot locate the time when I left. I was there a year and a half and he was there with me; and he was then appointed deputy clerk of Hardeman county and served two years. Do not remember whether my husband and I left there in '91 or '92. We went from Quanah to Hartley. My brother left Quanah in the spring, and from there he went to Mentone, Loving county, Texas, where he engaged in the real estate and farming business, and looked after their irrigation business in Loving county. I do not know how large Mentone is, whether there is anything there at all or not. He went to Mentone in '93 or '4. Did not go with my husband. My husband left me in Hartley county where he was living. He and my husband had a company

615 organized for irrigating purposes to build a ditch. I can't explain that because I do not understand it. My brother was a member of the company. Do not remember whether he was an officer at first or not, later on he was. Had his headquarters at Mentone, I suppose. I do not know anything about the business part of it. I was out at Mentone a little while in the fall of '95, in October. My brother was helping survey the ditch line. At that time there were very few houses in Mentone—might have been eight or twelve. My brother took up a school section in Loving county. It was organized at that time. My brother was sheriff of Loving county at the time he was there. Do not know where his office was; there was no place for his office. I understand that he was also tax collector. I have seen some of his letters with a card on it, said: "Sheriff and tax collector." Do not know where he kept his office as tax collector; there was no place there for an

office. It was a new place and very few people there. Only five women, and a few men to do the work; cannot tell how many men. They all hired help, and sometimes there would be more than others, very few of them there. Do not know what this county script was issued for. I only know of my husband's being an officer from what I heard. He never did any kind of work that I know of. He was a lawyer. I think my brother went to Mentone in '93. He made some improvements, or had some made, on the school section. He did not go out there and stay there. We were all boarding at the same place, up in town. He had a tent and some wire fence on the land. I don't know how much. The wire fence enclosed very little land; not much larger than this court room. There was a garden spot. The tent was a little square tent, can't give you the size of it. Do not know whether he ever slept in it.

He did not do much farming. He was working on this ditch to get ready for it; he was preparing to farm.

There was no use to do farming because of lack of rain.

616 He was digging the ditch and helping, so that when the water run in it would make the crop grow; no use to plant anything on dry land; no water on it; they were building the ditch, and that is what he was there for.

He had done no farming, only experimental farming. He planted every thing he could think of to see if it would grow—planted corn, grain, potatoes, beans, lettuce, radish, watermelon; I suppose an acre or more. They raised something every year they were there, so they told me. He was there three years.

"A." I don't know that he ever plowed an acre. I didn't see him do it; I know it was done, whether he did it or not. I know he raised corn; I saw it there, and pulled it off the stalk myself; not very many ears." "It was in November when I went there. I did not see very many ears of corn, I don't remember how many ears of corn—but I pulled an ear off the stalk myself, and opened it; might have been a dozen stalks or a dozen hills; might have been two dozen; I don't remember anything about it, only a little ground there. I saw no watermelons raised there, as I went there in November. Nothing could be raised without irrigation. He watered that land, watered it with buckets. That was their farming operation. They had not got their ditch built, and they wanted to know what would grow. They were there experimenting for three years. They never did complete the ditch; it is not yet complete. I don't suppose it ever will be. There was nothing more done on the ditch December 10, 1896 than now. They abandoned it.

"My brother started from Pecos to Loving county on the 3rd of December to prove up his school section and make improvements. The purpose he wanted the school land for was that.

When it is irrigated under this system they have there, it is very valuable, and some day it may be yet. At that time the ditch was abandoned.

617 "He went up there to put up a shan-y or something to hold the land as his claim, as all the others did. I don't know how large a house he intended to build, as he had not given me the dimensions. He was just going to make some improvements; fix some kind of a little house, so as to hold his claim. I did not say at the former trial of this case, at the last term, that he intended to take me up there to live with him. We were going up there, he was going up there and gather up some timber to fix up the house, and then he was coming back, I was going to stay with him until he got his work done, not to go there to live. He had to gather up some lumber; thay had some lumber left from some of their buildings, He took an ax and saw to work with. Ax and saw or a hatchet. At the last term I mentioned as many things as I could remember. I mentioned the stove and stove pipe, and the bed, and feed, and never mentioned any ax or anything of that kind; now, you call my attention to it, and I remember it. I don't remember that I mentioned a saw, but he took one just the same. I don't remember that I mentioned an ax, but he took it. I don't know all the things he took to make the improvements with; he may have gotten some other things down in town. I was present when the examining party discovered these things; I found an ax there, and a saw. I don't remember finding any nails; I did not think of them. He was not to do much work up there until he came back for me. The saw was a handsaw. The hatchet I took back to Pecos. I don't know whether I testified at the former trial that he had a hatchet. I cannot enumerate all the things he took, I might forget some; he took a bed, some can goods, flour, lard, coffee, sugar, stove, stovepipe, saw and a hatchet, a couple of buckets. Of wearing apparel he only took a little colored shirt, and an outside shirt to slip on over outside. He wore his overcoat; left the rest of his clothing with me in Pecos that consisted of a suit of clothes; and a suit of clothes in a grip; that was all the wearing apparel
618 besides some socks and things. I have sold all the clothes and the grip, I don't know where it is. Sold the clothes with my husband's clothes. Sold them altogether, as I had no use for them. Sold them at Fort Worth. Suppose it was to a second-hand man, as he was buying clothes. Left the valise at Mr. Migon's place at Ft. Worth about a year ago. Went there last Saturday and did not find it. I don't know of my brother going to Ft. Worth and engaging in the photograph business. He had that experimental farm at Mentone in the spring of 1896. When he left he said he was going to Ft. Worth. I got letters from him there. Don't know what he was doing in Ft. Worth. My brother was in Denison in the real estate business at one time. While in Ft. Worth he was in a gallery with Mr. Swartz, and probably helped him in the gallery if he was not doing anything else. Don't know whether he was hired or not by Swartz.

Q. I understood you to say you knew your brother's track; how could you distinguish your brother's tracks from the others?

A. I could distinguish—know they were tracks around the camp and then you could follow them.

Brother had on a nice calf skin black shoe, broad toe. I can not approximate the distance of the water from the top of the bank; I am only guessing at it; it looked to me like about 8 or 9 feet. The broken root to which I testified was about 18 inches from the edge of the bank, that is as near as I can remember; I didn't measure it. The foot-prints were along southwest of the river this way (indicating on the paper and map that the toes were pointing up the river at an angle of probably 45 degrees).

The broken end of the root pointed towards the river.

Witness said that at the time she saw the footprints on the bank of the river that other people had been there, but that she tracked her brother's tracks to that point, and that "she remembers same to be different from the others."

619 I made no measurement, and do not know of anyone else having done so. When brother left Pecos he had on a black suit of clothes. He always wore black. He had on a white shirt. He took a colored shirt. He wore off a white shirt, and cuffs and collar, and took a colored shirt to put on over it. Wore off a derby hat, I think. I went down there and saw the prints of the water bucket in the sand; cannot approximate the distance these prints were from the water. The contents of the grip or valise, as near as I can remember, was a suit of clothes, suit of underclothes, handkerchief or two, some old letters, little day-book or account book. It was a canvas grip, and what is called a telescope; that is the one I left with Mignon, at Ft. Worth. I know Mrs. R. S. Johnson; I stopped with her, and expect I was there in November or December, 1896. Think I sewed a little while at Mrs. Johnson's; don't think I stayed all night; don't know whether I did or not. I don't remember having told Mrs. Johnson in a conversation while visiting her, staying with her, that my brother had taken out a policy of life insurance for my benefit, becau-e he had not done it that I knew of. I don't remember that I told her in any conversation that my husband had died without leaving me any insurance, and that my brother had taken out insurance for my benefit. I don't remember of my brother having told me he was going to take out insurance for my benefit. We may have talked about such a thing, but I don't remember that he said he was going to do it.

On redirect examination, witness said:

Mr. Mignion has lived at Ft. Worth at least 25 years, I suppose. I had rooms at their house, and lived there last summer, but I went home and left my brother's grip in the house when I left there. My brother has known Mr. Swartz ever since he came to Texas in 1885 or '86; both Mr. D. H. and John Swartz were friends of his. They are photographers. He boarded at Mr. D. H. Swartz' house when he first came to Texas. Mr. D. H. Swartz had a brother living with him part of the time, his name was John Swartz.

620 R. D. GAGE, being sworn for plaintiff, testified:

I have resided in Pecos, Texas, since January 1884, with an interval of about three and a half years, in which I lived in Ward county, about six miles distant from Pecos. I practiced law, and am connected with the bank at Pecos, and own cattle. Am a stockholder and general manager of the bank. I make loans and pass upon securities. My position in the fall of '96 was the same. I have been a practicing lawyer for 20 years. Have known plaintiff some five or six years. Was acquainted with her brother, W. A. Hunter; first met him when Loving county was organized in 1893, in Pecos. W. A. Hunter was in my office in December 1896 and handed me a package of papers sealed in a large envelope and asked me to put them in the vault, which was done; it was sealed and had his name on it. I cannot claim to have had an intimate acquaintance with Hunter. During the last time he lived out there in Loving county, he was living across the river and came to my office two or three times a week. He appeared to me as a gentleman. He was a very mild mannered gentlemanly man, rather a good looking man, he would attract attention in a town; he was not much of a talking man. As to intelligence I thought he was above the average. He could talk well when he did, but didn't talk much. I never heard anything said against his character during those days that he lived there. He was a man, I presume, 5 ft. 10 or 11 inches tall; I think he had fair complexion, dark hair, dark beard or brown beard—mustache. Loving county was organized in 1893. The legislature in 1897 attempted to attach it to Reeves county, but the courts out there, the district court, decided it was unconstitutional. Prior to 1893 it was attached to Reeves county. The application for its organization was made to the commissioners' court of Reeves county, Texas. There was litigation instituted at Pecos in Reeves county, to disorganize or cancel the organization of Loving county.

I was connected as council with that litigation.

621 Q. So far as you know was any trouble or any matter bearing on his mind, any mental or financial trouble, the last time you had a conversation with him?

A. Nothing that I know of.

I served as county attorney of Reeves county some 12 or 15 years ago; was county judge of Ward county three and a half years; was in the State senate one term, from the 28th district, in which Reeves and Ward counties are located, and quite a number of other counties.

It was three or four, possibly five weeks subsequent to the time of Hunter's leaving the papers with me that I first learned of the contents of the envelope. Mrs. Mettler had called and was questioning me about some notes payable to Mr. Hunter's order, and the method of collecting them. I advised her with reference thereto. I told her her brother had left some papers at the bank, and got the package and asked if I would be permitted to open it. I told her that he left the papers there. There was no request for the papers. The trouble was the notes were payable to Mr. Hunter's order; she

was questioning me how she could collect them, and after advising her about that, I told her he left some papers in the bank, and got them and brought them to her and tore off the end of — envelope. There were three insurance policies and some other papers, county script, and may have been one or two notes in the package; some Loving County script, (which witness identified upon the paper being handed him). The papers were redeposited in the bank. Mrs. Mettler left them there. Prior to the time I opened the envelope I advised her with reference to having a search made for her brother. It was not in that conversation that she learned about the papers; in fact, I did not think about them. It was not until the searching parties had been up the river and she came to me about these notes that I mentioned to her about the package of papers. The camp had
623 been found prior to the second visit. I advised Mrs. Mettler with reference to the polices, and to their collection. I think I wrote a letter for her to the home office or formed a letter for her to write; I don't remember clearly what was done. I expect it was ten days or two or three weeks after the camp was found until I saw Mr. Milliken, the representative of the defendant company at Pecos. He was there a number of times off and on. I presume he was there only a week the first time, and probably longer; I guess I may have seen him nearly every day while there; he called at the bank quite a number of times; came there sometimes on banking business; he would get checks cashed possibly, and then friendly calls. Of course he was talking about his visit there, about this Hunter business, talked to me about it.

Cross-examination:

The litigation instituted to disorganize Loving county was by the Texas & Pacific Railroad Company; it was the prime mover against the various officers; J. J. Combes and the commissioner's court, to my recollection, and Mr. Hunter, as sheriff of the county, and I think it involved all the county officers. Suit was instituted along in 1895 or '6, I think. I think it is not terminated but is still pending. The parties were not in the county when the suit was brought. My impression is they had all left the county. I understood there had been no building in the county pertaining to the use of county officers, though I have never been in Loving county. I was not connected with that case, but was in a case wherein the parties sued upon county script. The case I represented in part was the case of Clark & Courts, stationery men of Galveston, Texas, against Loving county.

Q. Did you state before dinner the exact time this package was delivered?

A. It was in the early part of December 1896, I don't remember the exact date; it seems to me during the first week in December 1896.

623 The letter which I wrote or made a draft of to the company to be sent by Mrs. Mettler, was subsequent to her last visit

the second visit I speak of, and the appearance of Mr. Milliken, I cannot remember the exact time. My recollection is that I wrote a letter to the company, but do not know whether it was prior or subsequent. (Witness identified the letter which he wrote upon its being handed him.)

Redirect examination:

The suit I spoke of against Loving county, I think was in 1894 or '95. I had no connection with it at all as an attorney. Of my own personal knowledge I don't know whether Hunter was in Loving county at the time that suit was instituted or not, and do not know whether they got personal service on him.

Plaintiff then offered the depositions of W. A. Hunter, Sr., Mrs. Birdie Yoakum, Elma L. Yoakum, Clara Hunter, Mrs. Lou Butcher, Mrs. Minnie Householder and Charles E. Hunter.

WILLIAM A. HUNTER, SR., testified:

That he was 71 years old, and resided at Homer, Ohio, and had for about 53 or '4 years, and was by occupation a farmer during that time. He is the father of the plaintiff and W. A. Hunter, Jr., and also of the other witnesses last above named. Plaintiff and W. A. Hunter, Jr., lived at Homer, Ohio, until they went to Texas about 1885; since then a family correspondence had been kept up with them both regularly all the time until the fall of '96 when William A. Hunter, Jr. disappeared, and that the correspondence had continued with the plaintiff up to the present time. "The family relationship was always happy and affectionate in every particular. The habits of William A. Hunter, Jr. were good, and his disposition, though retiring, was very congenial, and he was universally esteemed. He was intelligent and careful, and possessed the confidence of his family and friends in every particular, I believe,
624 and seemed to be thoroughly contented with life, and I know of no reason to cause any change in his disposition. I could not tell exactly when any member of the family at Homer last received a letter from said William A. Hunter, Jr., but a short time before his disappearance. I last heard of him through Jennie M. Mettler, about the time he disappeared; and he was living at Mentone, Texas, I believe. I don't know with whom he was living."

The following questions were asked each of the said members of the family, who testified by deposition:

The following question was propounded to this witness, and to all the members of his family, whose depositions were taken, to-wit: Mrs. Birdie Yoakum, Elma L. Yoakum, Clara Hunter, Mrs. Lou Butcher, Miss Minnie Householder and Clara E. Hunter.

Q. If you know, state what is the general reputation and repute in the family as to whether said William A. Hunter is dead or alive? How do you know the general repute in the family as to

whether he is dead or alive? If you know, what is the general repute in the family as to what has become of said William A. Hunter? As to the 'family' who do you mean"?

To which question and the answer thereto of each witness defendant then and there objected, for the following reasons, to-wit:

1. Because it is incompetent and hearsay.

2. Because family reputation cannot establish the death when the family is 1500 miles away, and the members testifying are alive.

3. It is competent for no purpose, especially when that reputation has been established since the institution of this suit.

Which objections the court then and there overruled, and defendant then and there excepted to the ruling of the court; and the witness testified as follows:

That the general repute in the family is, that William
625 A. Hunter, Jr. is dead. He is supposed by the family to have drowned in the Pecos river; that is the general belief. By the "family" is meant the father and brothers and sisters of William A. Hunter, Jr.

The witnesses, Mrs. Birdie Yoakum, Elma L. Yoakum, Clara Hunter, Mrs. Lou Butcher, Mrs. Minnie Householder and Charles E. Hunter testified in substance as their father, and the same objection was made to their testimony concerning the family repute as to the death of the insured, and as to the cause of his disappearance, and the same ruling was made by the court, and then and there duly excepted to.

J. B. GIBSON, sworn for plaintiff, testified as follows:

I have lived at Pecos, Texas, since 1886. I am county and district clerk of Reeves county; have held the office about 12 years continuously. Know Mrs. Mettler. Think I first met her in 1895 or '96. I knew her brother, W. A. Hunter, at Pecos. Last saw him about the first of December 1896, at Pecos, in my office, at the court house. He was a man above the average intelligence. He called in my office and sat quite awhile; probably our co-versation lasted an hour and a half. He was rather a large man, with apparently an open countenance, frank, manly looking fellow. So far as I know his habits were good.

The first time I ever met him was in '94 that I remember of. I made search for him in 1896. The last time I saw him was between the 1st and 3rd of December, when we had the conversation.

Sometime during the day of the 26th of December on my way from the clerk's office to my home I heard about Mr. Hunter being missing, and I saw Mrs. Mettler; I spoke to her and asked her if she had heard anything from her brother, I told a neighbor named Tulk about the rumor, and asked him to go with me to make a search for him. He and Geo. Mansfield went with me. On the morning of December 27th, 1896,

we got a hach and team and prepared ourselves to camp
626 out. I went to Mrs. Mettler and got a description of Mr. Hunter's outfit, wagon, horses, and what he had in the wagon. We started east from Pecos river towards the bridge over Pecos river. Pecos city is about a mile and a half beyond the river. We crossed the river on the bridge and turned on the east side of the river on the old Mentone road. I was on horseback, and the other two men were in the hack. We followed that old road up the river on the east side. It is open for 14 or 15 miles above the bridge. I was riding in front of tha hack about 150 yards, and watching for any indication of the wagon trail. At a point about 14 or 15 miles above the bridge I discovered wagon tracks turning to the left; I followed these tracks about 100 yards; I think they turned right square off and went down to a point about 100 yards from the road; there was a slough going down this way running parallel with the river; the wagon had been driven up the slough—there was very heavy mesquite brush; I followed the trail up there and the wagon had been turned to the left. At that point I got down and examined the tracks; I examined the tracks of the horses; it was my understanding there was a large horse and a small horse in the wagon; my object in examining the tracks was to find whether I was on the right trail or not; I saw one of the horse's tracks were large and one was small; I came to the conclusion that we were on the right trail and I waited for the other parties to come up; they had stopped the hack and come up to where I was; I told Mr. Tulk to go back to the hack and follow the road—the road running up the river, and the trail seemed to be running up the river. I told him to go back to the wagon road and I would follow this wagon trail. We traveled along there—I was hardly out of sight of the hack, the road and the train run parallel, the wagon trail running through the brush; I followed that slough—the wagon seemed to follow the slough; I followed that wagon trail a quarter, or may be a little more
than a quarter of a mile, up to where some cow
627 trails crossed the slough going in towards the river; when the wagon got to that point it took the cow trail and turned across the slough; I then called Mr. Tulk to come on and we would follow the trail; they come and we followed the trail through the brush; I was some distance ahead of the wagon, and they were following me; they were in the hack, I was on horseback. I followed this trail a quarter of a mile I expect, at any rate I came to a little point where there was no brush and looking in front of me about 100 yards, something like that, I saw a wagon, and stopped and looked and saw some hay—some bales of hay in the wagon, and from the description of the outfit I was satisfied that was the outfit. I stopped there; there was some buzzards there, and I stopped and waited until the hack came in sight and rode back to tell them I was satisfied the outfit was right there. Mr. Tulk followed along and George Mansfield and I went up to the wagon. The wagon

was about a half a mile nearest point to the road, and about 125 or 150 ft. from the river. The wagon was standing with the tongue pointing to the southwest, and a little down the river. The harness for two horses was found; two wooden water buckets, with a piece of rope tied in the bail; off to the right of the wagon about 12 ft. from the wagon was a dead horse tied to a mesquite bush with a rope about 12 feet long. On the right side of the wagon was a pallet made down. The spring-seat had been taken off the wagon and turned upside down, and the wagon sheet laid lengthwise. The sheet was a tarpaulin; this was laid on the ground and spread out full length, with one end resting on the wagon seat. One or two heavy cotton comforts were doubled lengthwise and lay with the end on the wagon seat. Lengthwise of the wagon sheet and on top were two comforts spread out full size and the wagon sheet had been drawn up over the entire bed. To the left of that about 4 ft. south and away from the edge was where there had been a little fire, and there was a skillet and lid. The skillet was setting right where the fire had been built, as if in the middle of the fire, and the lid
628 laying against it. The skillet looked like it had been cooked in. Just behind the front wheel of the wagon leaning against the axle was a Winchester rifle. In the wagon were two bales of alfalfa hay and some flour, some can goods, some lightbread, and several joints of stovepipe, and I think maybe a stove in the wagon and a few other such things. The bread had been untied, and there was still some of it in the paper. When I first saw the bed the center part of the bed had the shape of a man in it; looked so much like it we thought there was a man in it until we got right up, and when George Mansfield started to raise the cover up he dropped it, and turned and looked at me, his face as white as anything could be, and I told him to raise it up, that if there was a man in it, it would not hurt him, and he raised the cover up. The appearance of the bed was as I have described it; there was just the shape of a man there, as if a man had lay in bed; the print of him was in bed. I think both buckets had a piece of rope tied in the bail, ten or twelve feet long, and on the bottom, two or three inches around, the buckets had the prints of water having been in there and dried up, and a little red sand; they were both dry. The dead horse could not reach the wagon; it had been tied to a mesquite bush with an inch rope, and it appeared that the horse had been struggling to get to the hay in the wagon; he had gone out as far as he could with the rope; there was considerable trail beat around where he was trying to get to the wagon where the hay was. The trail was two or three inches deep. There had been other stock about the wagon and camp; there was the sign of another horse there, and we trailed that horse away from the wagon and back to the wagon at about a half a dozen places. I think one bale of hay had been eaten and tramped down; there was a great deal of trash on the back end of the wagon and laying on the ground.

After we didn't find Mr. Hunter near the wagon, at the camp, we

began to make a search for him around the wagon, and we looked for awhile, and finally we struck a trail leading in the
629 direction of the river—tracks of a man—we traced these tracks to the edge of the river and back to the wagon.

The direction from the wagon to the river and back taken by these tracks was about due southwest. Where the tracks had gone down to the river there was a little peninsula or kind of a second bank that went out into the river; the tracks had gone down on this peninsula; there was a kind of slant from the bank down to the edge of the water on this peninsula. The tracks were all the same length, and apparently made by the same feet. On a little bench about 15 or 18 inches on the peninsula was the print of a bucket where it had been set down, and at that print was a footprint with the heel toward the river. We were all together making a search, and we followed the tracks back to the river; we were walking along together, and at a point about 20 ft. from this little peninsula back east on the bank we discovered footprints leaving this general course and going toward the bank of the river at a point higher up. Footprints were perfectly distinct; some one said Let's follow this print and see if it returns; we followed that right up to the edge of the bank and followed that until they went over a little slant; the top of the river bank was a little sloping; these two footprints; last two, were standing right on that slant, left foot a little behind the right. The footprints had been about half facing the river. The left foot seemed to have turned a little and slipped; the print of it was there and showed that it had slipped; and just in front and just below where this bank dropped off perpendicular there was a mesquite root that had been broken off, and a part of it was sticking out of the ground. We could see none of these tracks were going back and away from the river; we looked to determine whether they did go away from it, and we could not see any going away from there. The height of the bank above the edge of the water, where this root was broken off, I should say was between four and five feet, the first time we
630 were there. This little slope came down and dipped in a little until it got down within about 18 inches of the water, and there was about 18 inches of sand from the bottom of the bank to the edge of the water at the time we were there first. The first time we were there was the 27th day of December, then again on the 29th, and I was there on the 20th of January following. On the later date I saw the water in the river measured. At this time Milliken, Slack and R. S. Johnson were with me. Mr. Slack went in the river. Mr. Milliken told him he would give him $5 if he would go into the river. On that day it was pretty cool; the river looked to me like it was pretty full, and muddy, and swift, and it was suggested to Mr. Slack that he tie a rope around him. He did so and one end of it was held by those who stood on the bank. Slack went into the river at this peninsula and came up along the edge of the water until he got right opposite where those two footprints were,

There had been a rise in the river between the time I was there on the 27th of December 1896 and the 20th of January 1897; I know this because it was higher at this time than it was at the first time, and there was a sand bar against the bank about 3 ft. wide; I could tell because there was a print on that point—I had examined at that and that was not visible, and I took a stick and measured down in the water and touched this place, and I should think the river was three or four inches higher than it was on the 29th of December. Mr. Slack came up to opposite where these foot prints were and went out into the river, waded out gradually until he came to where he couldn't wade, and made some remark as to not being able to wade longer, and Mr. Milliken told him to let down and hold up his hands, and he let down, and the water struck him about half way between his wrist and his elbow; his head was under the water. He must have been between 15 and 20 ft. from the bank. At that time I think the current of the river was little further away from the bank. The
631 last rise between the 29th of December and the 20th of January had thrown this bar there. I think the current was probably three or four feet further from the bank than on the 29th. The river was pretty swift in the main current. There was a difference between the bank at its foot where the mesquite was broken, and the appearance of the bank on January 20th; about three feet difference. This sand bar begun just above and opposite where these foot tracks were on the bank and extended almost down to that peninsula; that bar must have been three feet wide; that bar was not there on the 29th of December, it had been thrown there by a rise between the 29th of December and the 20th of January. On a staight line from Pecos to where we found the camp it is about 12 miles; the way went crossing the bridge and following the road, it was at least 18 miles. The Pecos river is the most crooked stream I ever saw; never saw anything to compare with it; you don't find 100 yards where it runs in a straight direction. I think it heads in Colorado in the Rocky mountains; runs through New Mexico and through that portion of Texas to the Rio Grande. There is always a pretty good volume of water running in the river. It is always muddy, of a dark reddish color. It has a quicksand bed. I have known the Pecos ever since April 1886; it is a quicksand river. It is very much the same at every point. This quicksand is right down close to the edge of the water. When there is a little rise, and it begins to fall, the water and *and* sand seem to be perfectly loose. If you get on it you gradually sink down; you sometimes sink quick and other — sink gradually; pretty much all of the bed of the river is that way; at least, that is about the best description of the quicksand I can give. That is the condition at almost all points on that river. I have seen cattle sink in the sand. Never saw an individual sink. In 1886 I went to that country with a heard of cattle. We had about two thousand head of steers. When they went to the river to drink I have seen as many as 30 or 40 sink down, and we had
632 hard work getting them out, and some of them we did not get out at all; that was something we had to do nearly every day

as long as we watered cattle on that river, from the time we struck the river until we left it at Roswell; we must have lost three or four hundred head of cattle in that river; that is my experience. That is the condition on that river, especially after a little rise. Going from Pecos up to Mentone through the country on the road that we were going, the distance is about 40 miles. There are two crossings on the river from Pecos to Mentone that I remember—one was Rocky crossing, about 8 miles above Pecos, and the other right opposite Mentone. The camp outfit was not near the crossing; it must have been five or six miles above what we call Rocky crossing, between 7 and 9 miles above Pecos. The wagon was on the east side of the Pecos river. The usual crossing going from Pecos up there would be by the bridge between Barstow and Pecos. Barstow is east of Pecos, and the bridge is between these two towns. Barstow is east, and Pecos is west of the river. Usually we cross at the bridge and go up on the east side of the river; go east until you cross the bridge, and then the road turns up on the east side of the river. Mentone is on the east side of the river. Barstow is about 4 miles from where the road turns up the river. The temperature of the water is about the same; it is always cold, just as cold at one time as another. A rise in the Pecos does not depend upon rain; snow fall affects it, it is fed by snow a great deal.

There was a distinct water mark showing it was 18 or 20 inches higher than it was on the 27th. Going from Pecos to the river it is practically open after you cross and turn on the east side. It is very near two miles from Pecos to the river at the bridge. If you cross and go up this side, at that time there was considerable heavy brush; it has since been cleared away and put in cultivation; after you reach the open about six or seven miles
633 above the bridge you pass through some open country; then after you get over the little range of hills you come down into a valley again and go into very dense mesquite brush. At and surrounding the camp the character of the soil is sandy, red sandy soil. It seems to me that there was one pasture gate at that time that you had to go through in making that trip along that road in about December. I think Johnson's pasture fence was just about opposite this wagon crossing that we called Rocky crossing, about eight or 10 miles above Pecos; the camp was 14 or 15 miles from the bridge. Quick sand shifts from one place to another with the rise and fall of the river. The current of the Pecos river changes every time a rise comes to amount to anything; you hardly ever see the current at the same place after there has been a rise, it just flops over one way and then the other. The river will average about 180 feet in width. At the time we went up there when Slack went into the river—the water at that point was not 180 feet; it must have been at least 60 ft. wide—I expect more than that. He went out in there about 20 ft., and I am satisfied he did not go more than one third of the way. I don't know how far it was from where he let down to the west edge of the water, but he went down gradually in the river until he

reached a point about 18 or 20 ft. from the edge of the water; he went down until he went out of sight; and I am satisfied the water must have been something over 6 ft. deep; that was probably the deepest place in the stream. The main current was not quite so far out as he went down.

Court adjourned until Wednesday morning May 30, when the following testimony was adduced: GIBSON on the stand:

On the 29th of December Mr. Slack and myself went down the river from the wagon where the outfit was found followed the meanderings of the river; followed the bank quite a distance down the river; we did not follow it quite to the dam, the head gate of the Pioneer canal; we followed down as far as we could go right close to the bank so we could see the river as far as we could
634 see it. That was on my second trip to the camp. We were searching for the missing man Hunter. I was district clerk at Pecos, and also when the civil suit was filed against the same officers. W. A. Hunter was at Mentone at the time and personal service had on Hunter by the sheriff at Mentone. As well as I can remember the suit was filed about the March term 1895, and service might have been gotten, but I know Mr. Hunter was there at the September term 1895 in person. These suits have never been tried. I don't know who was first elected sheriff of Loving county; there was some man elected when the county was organized, but I don't remember the name; it was not Hunter; he was not the first sheriff, he was the first sheriff qualified; my recollection is the man first elected was not qualified; all the officers qualified before me but the sheriff.

I think Hunter was not there at the time Loving county was organized. He was not with the officers when they came down to qualify.

On cross-examination witness said:

I have testified before in this case by deposition and by oral examination.

Q. Didn't you testify at the last trial that you followed the meanderings of the river about 9 miles?

A. I don't know whether I testified that way or not; it would be hard for me to tell.

It is a fact that I testified in my deposition that the average bed of the river was about 90 to 100 ft. in width.

I think I stated in my deposition that the bed of the river right opposite the mesquite root was probably 65 or 75 ft. The water in the river and the average depth of the bank was six feet, and the country almost perfectly level; that is true today. It was between ten days and two weeks after we discovered Hunter's camp until I was acquainted with the fact that there was insurance on him. I got the information from R. S. Johnson before Milliken came
635 to Pecos city. I testified by deposition "I first learned that Mr. Hunter's life was insured by R. S. Johnson about a week

after Mr. Hunter's outfit was discovered." My memory was better then than now; it was not quite so long after the transaction. We found the following articles at the camp: Harness for two horses, including bridles, collars, &c., a bed with two or three comforts, wagon sheet, or tarpaulin, skillet and lid, and in the wagon two bales of hay, some can goods, some flour, some light-bread, knives and forks and tin plates, two water buckets on the ground near the wagon, and I think some stove pipe, probably one or two joints, and that is about all I remember. I don't remember whether I saw any hand saw or not. I don't remember that I testified about a hand saw on the former trial or in my deposition. I don't remember that I saw a hand saw there or an ax, I think I saw a hatchet; cannot say positively that I testified before that I saw a hatchet. In my deposition it is true that I purported to give a list of the articles found, and described each in answer to interrogatory No. 7, and in the next interrogatory was again asked the question, and in my answer referred to interrogatory No. 7, and stated that I gave a list of all the articles therein.

The witness was handed his deposition, and admitted that his answer to interrogatory No. 7 did not mention the hatchet. He also admitted that in his answer to interrogatory No. 12 that it alleges as follows: I have given an itemized list of all the articles found on the ground at the camp in interrogatory No. 7. My memory was fr-sher then than now. It took me two or three days to answer that deposition; it may have been six days; I took all the deliberation I wanted. It is a fact that I was better qualified to tell the true state of facts at that time than at present, but there was so many of these questions I might not have remembered this particular thing. I think I mentioned the hatchet in the affidavit
636 I made immediately after the occurrence; tho' I have not seen it since it was made.

On the 27th of December 1896 the water at the foot of the peninsula that run out in the river was 18 inches below the foot prints. There was one distinct foot print on that point, and there was one other print that I took for a foot print on the 27th, but that was near the edge of the water. The water was about two inches below what I took to be a distinct foot print. At the time Mr. Slack waded out in the river and went down in the water; at the time he let down he came out and stated that the bottom was hard. That was immediately opposite the broken root, where it is assumed Hunter fell in. My recollection is that Slack went down on the peninsula and came along the edge of the bank until he got opposite where the foot prints were, and then went out in the stream. Out at the peninsula he waded out into the water until it was about waist deep. I didn't say that there was quicksand right opposite where the root was broken; there was sand on the opposite side of the river; there was a bank of sand on the side where the root was broken on the 20th of January 1897; that was where Slack waded into the water; I did not say it was quicksand, said there was a sandbar there. There

was sand there, it might have been quicksand; there was sand there on the 20th; Mr. Milliken had to put the spade on it to stand; I did not go down there to test it, but it was quicksand. I don't remember whether Mr. Slack had any trouble in walking out on it. After he got out of the river Mr. Milliken asked him about the bottom of the river, and he said it was firm. He went out 18 or 20 ft., went straight out opposite where the root was broken off. He didn't mire up in wading up and down, and didn't complain of quicksand; did not seem to have any difficulty in wading up and down, except the current of the river. I call a stream swift that would be difficult for a man to swim straight across; from 7 to 10 miles
637 per hour would be swift; I think that stream travels that fast.

Q. Did you ever see a swift stream whose current is as tortuous as this, that is, as winding, did you ever see a swift stream that had a crooked bed?

A. I have seen a good many swifter streams than the Pecos. Of course if a stream was straight the current would be swifter.

Mr. R. S. Johnson accompanied us in the searching party on the 29th of December, and his wife and Mrs. Mettler.

Witness then placed his foot on a piece of paper assuming that the edge of the paper was the bank of the river, in the same relative position according to his recollection as were the foot prints discovered by him at the place where the broken root was found, which were placed at an angle of about 45 degrees, the toes pointing up the river, the distance between his feet being about 4 inches.

Witness testified that the toe of the right foot was about 12 or 14 inches from the broken root, probably 18 inches. The foot prints at the broken root were about 18 or 20 ft. from the peninsula. The wagon was about 150 ft. from the broken root. We made measurements there in January 1897, made none before that time. (A diagram with the measurements placed thereon, and having the signature of the witness is handed to him and identified as being correct, and same was offered in evidence, and is as follows, to-wit:

"The wagon was standing where the letter "B" is on the diagram; "X" is the broken root; "C" is the peninsula. At the point "I" just 7 ft. and 9 inches from the point "X" I think the water was three feet deep. I swore to it in the affidavit, and I think it states that it was that deep at that point. From the perpindicular portion of the bank to the water's edge where the root was found there was a little slant about 18 inches wide. I was there on December 27th, and again on the 29th, and saw no indentation like as though a falling body had struck it, except a little scarred.
638 I said yesterday that the water must have been three or four inches higher on January 20th than on December 27th and 29, 1896; I think it was a little more than that; must have been six or eight inches higher. The foot prints were not covered on the 20th of January 1897 on the peninsula. This indistinct foot print was covered. The mark of the buckets was on the second bench of the point from the water's edge. When we arrived there on the

20th of January I noticed that this little bench where the indistinct foor print on the peninsula was covered with water; I told Mr. Milliken and described — to him; we could not see it; I pushed a stick down right over where I knew this indistinct foot print was, pushed it down until I touched something, and the stick stopped.

This point was tolerably hard. There was very little sand in it; there was sand right on top where this bucket print was; down around the edge of the water was mostly roots. In my deposition I think I testified that the indistinct foot print was 8 inches above the water; I think now it was 8 inches, and the water was about 18 inches below the distinct foot prints, that would make the water about 14 or 16 inches lower than the indistinct foot prints on the 27th and 29th of December. On the 29th of December the water was an inch or two below the indistinct foot print. The indistinct foot print was what seemed to be the impression from the ball of the foot. These foot prints were the ones on the peninsula.

Witness said that at the point where the root was broken it was broken on the upper side showing that it had been pulled up. There was underneath the root,—as if it had been pulled out of its place, and when it broke to make an indentation in the earth beneath. (Witness showed how it was broken, and stated that the broken end of the root pointed toward the river, and in indicating the manner of the break, showed that the party breaking it pulled away from the river.) The pile of ashes at the camp was a small place— 12 or 14 inches. There was some broken twigs there around the ashes, and a stick of some kind of wood there about the
639 same size, which corresponded with the same size and character of wood as the broken root found on the bank; I compared that found at the fire with that broken off in the bank; took the remainder of the root out of the bank. My recollection is, Mr. Milliken dug this piece of wood out of the bank and turned this stick of wood fou-d at the fire over to me, and I carried that home, and carried home the rope, put them in my dining room, and they lay there for over a year; my wife carried them out into the barn, I think, and the wood was burned by some wash woman, and I don't know what became of the rope. That was the only large piece of wood at the camp, and it was a good deal larger than any other piece. I think I made two trips up the river with Milliken. The second one was in February 1898; Milliken, Slack and R. S. Johnson and myself went on the second trip. The measurements were made January 20th, 1897. Some photographs were taken on the trip in 1898.

On redirect examination, witness said:

Beds of quicksand lay along the river edge of the water, and during a rise or just after a rise as the water begins to fall is when the sand is most dangerous. When the river is flushed a body will sink down; when the river is up a body will sink down out of sight. After the water goes down, and after a time elapses the sand gets

firm, and then we can walk on it. An animal can go upon it with perfect safety after the water has been gone down off of it for a while, but when it comes up and recedes, or gets full of water it is quick, and a body with any weight will sink right down into it. The diggong up of the root changed the surface and formation of the bank considerably.

Witness identified the photograph taken, and states that it showed his position, and the position that his hand was resting when the photograph was taken. The photograph was offered in evidence.

Milliken took the photograph with a kodak. Other photo-
640 graphs were taken by Milliken, and I was taken in several different positions.

F. M. ETHRIDGE, being sworn for plaintiff, testified:
I am a lawyer, and reside at Dallas; have practiced law 20 years.

The following question was propounded:

Q. This is a suit upon three policies of insurance for $5000, the assured being the brother of plaintiff, and who is beneficiary; it is alleged by plaintiff that he was drowned on December 4th, 1896 about three years and a half ago; she seeks to recover on these policies; Defendant pleads insufficient proof of death. Further that the application for insurance states that her brother was a farmer and real estate agent, and that that was not true. They say he is not dead but living, which suit has been pending for three years; evidence has been taken at the point of the alleged drowning out at Pecos; taken at Nashville, Tennessee, and Homer, Ohio, and there has been a contest on the issues all along the line. Please state what in your opinion would be reasonable attorneys' fees?"

To the question defendant objected, because attorneys' fees and statutory penalty are not recoverable against a mutual association, as it is alleged, because the statute allowing the attorneys' fees and penalty is contrary to the Constitution of the United States and the State of Texas, and because they are not recoverable under the Texas statute.

Which objections were by the court then and there overruled, to whic- ruling of the court defendant then and there excepted, and the witness answered that a reasonable attorney fee would be $2500.00.

GEO. A. KNIGHT, witness for plaintiff, sworn, testified:

I reside in Montague county. Have resided at Pecos in
641 Reeves county, Texas. I went there first in 1884; resided there three years. I was United States marshal of this district three years. The nature of my business while at Pecos was trying to build the town of Pecos and help develop the country. Bought the land where the town now stands. The town then was down close to the river; I moved the old town to where it now stands. There were 65 houses. While out there I was engaged in

the irrigation business and real estate; was familiar with the Pecos river; had occasion to make study of it before I went there and afterwards. The Pecos is a narrow river, comparatively, with a great deal of water in it; it is said to run more water than any river in Texas; I don't know whether my information is entirely reliable or not. It is a river that runs as much water as the Trinity, at least; perhaps not so much as the Trinity does at times; the Trinity at times runs more water than the Pecos does at any time, but ordinarily it runs more than the Trinity. It is a narrow stream comparatively, with very steep banks. There is a great deal of quicksand in the river at very many places. I consider it dangerous; I got into it once; into the quicksand; came very near not getting out, and was duly sober, too. I was trying to get a sheep out. The sheep could not get out and I got down in there to help it out and got into the river myself, and got into the quicksand; that was near Pecos city; the banks were steep. I know from living there as long as I did, I know of course a great deal about the character of the river and current; it is a very swift stream when the water is up, and is always up, comparatively; there is always a large body of water; I never saw it when I could see the bottom of it; I never saw it low, in the deepest parts of it. The nature of the quicksand is to shift. I organized the first irrigation company out there.

On cross-examination, witness said:

I was there in 1884, and left there in December 1888. A dam across the river at Eddy, New Mexico, was begun abou- the
642 time I left, and has been completed since. All the water above the dam is not taken up at Eddy; I don't think all the water that comes down is the seepage from the springs on the bank of the river; I think there is less in the river below Eddy now than there was before the dam was built; not so very much less. I have never seen the river in the summer time below Eddy get so shallow that you could jump across it; have not seen it so low that it was not more than a foot or a foot and a half deep, but I have not been there much since. They do not irrigate in December.

The plaintiff offered in evidence a statute of the State of Pennsylvania entitled "An act relating to warranties in applications for life insurance policies," which is as follows, to-wit:

SEC. 1. Be it enacted, etc., That hereafter whenever an application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentations or untrue statements in such application, made in good faith by the applicant, shall effect a forfeiture, or be a ground of defence in any suit brought upon any policy of insurance issued upon the face of such application unless such misrepresentation or untrue statement is relative to some matter material to the risk.

Plaintiff rested.

R. W. FINLEY, witness for the defendant, being sworn, testified as follows by deposition taken June 14th, 1898:

I am comptroller of public accounts of the State of Texas, and have been since the 15th of January, 1895. Records pertaining to assessment and collection of State taxes and bonds of county tax collectors, and all vouchers for the disbursement of State funds, are kept in my office. The records of this office show who held some of the county offices in the State of Texas for the past 6 years, but not all of them.

Copy of bond of W. A. Hunter, insured, as tax collector of Loving county, Texas, under appointment made on the 16th day
643 of September 1893, and payable and conditioned by law with H. B. Taylor, W. A. Nunn, and S. F. Miller as sureties and dated 16th day of September 1893, was introduced in evidence. Said bond was in the sum of $926.87.

Another bond of the said Hunter as tax collector of Loving county Texas, dated February 10 1895, in the sum of $950.00 payable and conditioned as required by law with W. A. Nunn, Etty M. Todd S. L. Miller and B. F. Sprinkle of Loving county as sureties was introduced in evidence.

The first bond above mentioned does not show to have been approved by the comptroller. The second bond was approved Feb 13, 1895.

I attach my deposition certificate showing who was tax collector of Loving county, Texas for each year while it was an organized county marked "Exhibit E" and made a part of this answer which certificate and "Exhibit E" is as follows to-wit:

AUSTIN, TEXAS, June 13, 1898.

I, R. W. Finley comptroller of public accounts of the State of Texas, hereby certify that the records of this office show that W. A. Hunter was sheriff and tax collector of Loving county, Texas, from its organization until it was disorganized, or for the years 1893 to 1896; no record being in this office to show who held those offices from November 1896 until it was disorganized in 1897. This certificate is made a part of answer to interrogatory 4.

Witness my hand and official seal at office in Austin, Texas, this 13th day of June A. D. 1898.

[OFFICIAL SEAL.] (Signed) R. W. FINLEY,
Comptroller.

W. B. WORTHAM for defendant, testified by deposition taken June 14th 1898 as follows:

I reside in Austin, Texas, am treasurer of the State of Texas, and have been since January 1891. I am custodian of all records of cash receipts and land accounts. The records of the treasurer's office do show what amounts have been paid on the accounts of W. A. Hunter for sections numbered 34 and 46, certificates number 4989 and

4995, surveyed by the T. & P. Railway Company, and located in Loving county, and a copy of which is hereto attached marked "Exhibit A," and "Exhibit B," and made a part of my answer to this interrogatory.

644 Defendant offered certificates of John W. Robbins, treasurer of Texas, which are as follows, to-wit:

"File No. 35718; Ledger 25, Page 41; W. A. Hunter, Loving County, Section 34, Block 55; Certificate 4989, T. & P. R. R. Co.; Value, $1280; Note # 1248.

"First Payment, $32 00; Interest, 5%; Receipt No. 10004; Date, September 27, 1893; Pecos.

Date.	Principal.	Principal.
Sept. 6, 1893, to obligation, $1248.00.		

Forfeited,—non-payment int. to 8/1/95.

STATE OF TEXAS, }
Travis County. }

I, John W. Robbins, treasurer of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the account of W. A. Hunter, for the purchase of above mentioned land, showing all payments made on said account, as *papers* in Ledger 25, page 41, of this office.

Witness my hand and seal of office at Austin, Texas, this May 31, 1900.

[OFFICIAL SEAL.] (Signed) JOHN W. ROBBINS,
Treasurer of the State of Texas."

"File No. 35969; Ledger 25, Page 136; W. A. Hunter, Loving County, Section 46, Block 55; Certificate 4995, T. & P. R. R. Co.; Value, $1280; Note # 1248.

"First Payment, $32.00; Interest, 5%; Receipt No. 10182; Date, Feb. 5, 1894; Mentone.

Date.	Principal.
Jan. 24, 1894, to obligation, $1248.00.	

Forfeited, non-payment, int. to 8/1/95.

STATE OF TEXAS, }
Travis County. }

I, John W. Robbins, treasurer of the State of Texas, hereby certify that the above and foregoing certificate is a true and cor-
645 rect copy of the account of W. A. Hunter, for the purchase of above mentioned land, showing all payments made on said account, as appears in Ledger 25, on page 136 of this office.

Witness my hand and seal of office at Austin, Texas, this 31st day of May, 1900.

(Signed) JOHN W. ROBBINS,
[OFFICIAL SEAL.] Treasurer of the State of Texas."

Defendant offered the certificate of commissioner of land office as follows:

"The State General Land Office.

AUSTIN, TEXAS, June 14, 1898.

I, Andrew J. Baker, commissioner of the general land office of the State of Texas, do hereby certify and hereby cause the seal of the general land office of the State of Texas, to be affixed thereto, that W. A. Hunter filed his application and obligation in due form on September 13, 1893, to purchase section 34, township 55, certificate No. 4989, T. & P. R. R. Co. containing 640 acres of land, classed as dry agricultural land, and at the price of $2.00 per acre; that the State treasurer of Texas filed the receipt for said Hunter in this office on September 27, 1893, for $32.00 being 1/40 of the whole purchase price, the same having been paid by J. J. Combs for said Hunter, and the land was awarded to the said Hunter September 28, 1894; that no interest has ever been paid on his obligation; that the said Hunter also on the 27th day of January, 1894 filed his application and obligation in this office in due form for the purchase of section 46, township 2, block 55, certificate No. 4995, T. & P. Ry. grantee, containing 640 acres as dry agricultural land, and at the price of $2.00 per acre; that the treasurer, aforesaid, filed the receipt for the sum of $32.00 paid by the said Hunter as first payment, being one-fortieth of the whole price, that no interest has ever been paid on the said obligation, that both of the foregoing
646 obligations were forfeited on February 8, 1897, for the nonpayment of interest for the years 1894, 1895 and 1896, the treasurer not having before reported the accounts as delinquent; that immediately after the forfeiture the said lands were again placed on the market by a formal notice sent to the county clerk of Loving county.

All of which appears from the records of this office. That I have not been able to find any other land in Loving county, or elsewhere applied for by Hunter.

In testimony whereof, I hereunto set my hand and the seal aforesaid, this 14th day of June 1898.

(Signed) ANDREW. J. BAKER,
Commissioner.

[Official Seal General Land Office.]"

Mrs. R. S. JOHNSON, for defendant, testified by deposition:

"I reside in Reeves county, and have since the 1st of 1895, am the wife of R. S. Johnson, who resides in Pecos, Reeves county, Texas; am acquainted with Mrs. Jennie M. Mettler; have known

her since March or April 1896; am well acquainted with her, she having been a visitor at my home at one time for about one month. Mrs. Mettler and I were on friendly terms during the year 1896, she was with my people from the latter part of August to latter part of September 1896; was at my house frequently thereafter. I never visited Mrs. Mettler more than once or twice. I had a home in Pecos during the year 1896, and kept house during said year. After she visited me for a month in 1896 she made several visits when she would remain for a period of one week, and later on continued her visits, but only for an hour or two at a time. Sometime during the month of September 1896 Mrs. Mettler told me that her husband could never get insurance on his life on account of bad health, but that Will (meaning W. A. Hunter) had his life insured in her (Mrs. Mettler) favor. This conversation took place about two or two and a half months before W. A. Hunter was reported to be dead.

647 W. A. Hunter was in Pecos the last time from the latter part of November to about the 3rd day of December 1896; left Pecos to go to Mentone, Loving county, Texas, Mrs. Mettler and I had a second conversation on the subject of life insurance at my home about the latter part of December 1896, or the 1st of January 1897. During this conversation I asked Mrs. Mettler if Mr. Hunter had his life insured, she replied "Yes." I then asked her for how much he had his life insured. She replied: "I don't know." I then asked her in whose favor he had his life insured, and she replied: "In my favor." I said: "Oh, yes, you told me that once before." She said: "Yes, I did." This is all that was said during the second conversation.

On cross-examination, witness said:

Moved to Reeves county in 1890; I had only known W. A. Hunter a few days prior to December 1896. Met him the first time about the 29th or 30th day of November 1896; was introduced to him at my home in Pecos city, Reeves county, Texas; no one was present at the time except Mrs. Mettler, W. A. Hunter and myself; Mrs. Mettler brought him to my house. All the time consumed in conversation between Mr. Hunter and myself would not exceed two hours. Was not acquainted with S. L. Mettler, husband of Mrs. Jennie M. Mettler. Don't know when Mr. and Mrs. Mettler came to Pecos, if they ever did. Mr. Mettler never did live in Pecos; am informed that he lived for sometime at Mentone, Loving county, Texas.

F. E. Booth, witness for defendant, testified by deposition, taken 9th day of June 1898:

"Am 60 years old, and am a farmer and contractor. In the months of November and December 1896, was engaged in building a section of a dam across the Pecos river. The work done on the dam was for the Pioneer Canal Company; began work on the

648 dam November 23, 1896, and quit on December 1st, 1896; said dam is situated across the Pecos river; it is constructed

of mesquite trees and mesquite brush, salt grass and earth. The dam was rather compactly built; but little of the water trickled through it. It raised the water in the channel of the Pecos river about 5 or 6 ft. The dam was in good condition when I quit work on it. Had no further connection with the dam after December 1st, 1896. A time table was kept by me; was kept for the month of November 1896; said time table was kept on the workman's monthly time book; such as is in common used by contractors and contains the names of the workmen, the date when they began work, the number of days work done by each man, and the number of hours each man worked per day, also shows total time each man worked in each month, rate per day paid each man, and the total pay received by each man. I have said time table in my possession. The book in which said time table was kept is hereto attached, marked "Exhibit A" and made a part of this answer. I know the mode of the construction of the head gate of the Pioneer Canal Company. The foundation of the head gate is built of rock and cement. The gate itself is constructed of heavy cypress timber. The head gate is composed of six small gates; any one of which or all of which may be opened or closed at the same time. A body or susbtance the size and shape of an ordinary size man in the Pecos river at any point from 5 to 10 miles above said dam, to have gotten into said river below said dam during December 1896 or January 1897, would necessarily had to have gone over the dam or through the head gate, if it had gone over the dam it would remain in the river, if through the head gate, it could never have been returned to the river, unless gate No. 4 was open at the time.

On cross-examination, witness said:

I resided in Chicago in 1880; was then traveling railroad expert on construction. Resided in Chicago until about the year 188- or '89; I then removed to Eddy, Eddy county, New Mexico; when I took charge of an outfit for construction of what is known as
649 the P. I. & I. Company's Canal; completed my part of this work about the month of November 1889 or '90; soon after that took charge of an outfit for construction of a canal in Chaves county, New Mexico, for some company, was employed in this work until April 1st of the year following; was then employed on what is known as the six mile dam, six miles east of Eddy; remained on this work until about October or November following; was then removed back to Chaves county, New Mexico, and put to repair work on canal; was engaged in this work until about the month of January following; continued to work for the P. I. & I. Company in New Mexico until the following April; was then put to work on the Highland dam and canal in Reeves county, Texas; remained on this work until the following December, and then took contract on Highland canal; remained on this work until about August 1892. After this time took contract to construct canals in Reeves and Ward counties for the Pioneer Canal Company. Ever since

August 1892 have been working for the Pioneer Canal Company and its successors off and on. Have also done considerable farm work during said time.

W. H. DENNIS, offered by defendant, testified by deposition taken May 30th, 1899 as follows:

Am 45 years old and have resided in Reeves county for the last 5½ years; since November 1895 I have been water master for the West Valley system of the Pioneer Canal Company and its successors. My duties as water master consist of the care of the head gate and dam, 3½ miles of canal and the flume across the Pecos river, supplying water to the flumes in the West Valley system. I am also observer for the United States Geological Survey, hydrographic branch, since October 1898 under which position my duties chiefly are to take observations twice every day and the stage of the water in the Pecos river and the flume across it. To the best of my recollection on December 1st 1896, the Pecos river was from four to seven inches higher than it was on M-y 10 1899. I think
650 there was very little change in the stage of the water on the 3rd and 4th of December 1896 as compared with the 1st day of December 1896, except that the river was falling. My daily observations are taken at the flume seven miles north of Pecos city on the Pecos river. The United States Geological Survey requires a report at the end of each week. This report is sent to Prof. T. U. Taylor at Austin, Texas, under whose supervision I work; this is in addition to a book of permanent record which I keep. My daily talley sheets show for most of May, 1899, from which these reports and records are made—is herewith attached and marked "Exhibit A," This is the paper on which I made the original entries Ex. "A" as follows:

During the last 4½ years it has been my business to note the stage of water in the Pecos river at least twice every day, usually at the flume. In October 1896 I was absent about twenty days; in June 1898 I was absent about one week, except which times I do not recall any occasion when I have missed two daily observations and very often take three or more. The Pioneer Company's dam is constructed of mesquite brush laid with the little part of the brush upstream so that as the dam settles the heavy ends are exposed in a some what irregular way, dividing the flow of water into many little channels. The head-gates of the Pioneer Canal Company consist of six gates, each five feet wide, set in heavy timber; the water usually flows under these gates with a pressure of from one to three feet; in the winter time when the call for water is small they are usually set so as to leave an opening of from three to six inches. In the month of December 1896, hearing of a search being made for the remains of W. A. Hunter, I examined the head gate and dam very carefully on two different occasions without any results.

Plaintiff offered the answers of W. H. DENNIS to cross-interrogatories as follows:

I have lived in Reeves county between five and six years about eight or ten miles above the bridge across the bridge of the Pecos river; I do not know the road to Mentone; I know of two
651 crossings or fords on the Pecos river above the bridge at or near Pecos city; do not know whether either of these was ever used in going to Mentone or not. I have seen cow boys crossing cattle on the Pecos river; I never saw cattle run into the Pecos river and get into the quicksand or anything else and sink so rapidly that the cow boys could not save them; if such a thing ever occurred I never saw or heard of it. I heard of one person being drowned in the Pecos river; at the Rocky ford on the Pecos river about ten miles north of Pecos city; the river there has a solid rock bottom and I have been informed that the body was found and burried; the current of the river at this point is very swift and the river was at a very high stage at the time the man was drowned. There is very little material in the bottom of the Pecos river that can strictly be called sand. The bottom of the river is composed of clay and mud chiefly; these clay and mud deposits shift a great deal and at one time the river is deep over on the right and the sand- shift and filling in there and leave the river deep over on the left. I never saw the place that W. A. Hunter is supposed to have lost his life that I know of. I take the observations daily for the United States Government; the balance of my time is chiefly taken up with the canal company's business. I do not know what use the Geological Survey makes of my reports. I make all my observations at the flume of the Pioneer Canal Company. The guage is set on the suction by laying it out in the river and under the flume by instruction of Professor Taylor as an accurate pen to guage water. There could not have been much change in the river the 3rd and 4th of December 1896 and January 1897 for there was no serious raise. R. C. Millican has called on me two or three times; in the fall of 1897 I noticed him and Mr. Boothe at the latter's house. Mr. Millican wanted to know something about the dam across the Pecos river, and as Mr. Boothe had just rebuilt a portion of it he
652 was familiar with it. I made one examination of the Pecos river with Mr. Milliken; was not present when surveys was made of the banks. Last of December or first of January 1897, shortly after the search was being made for Hunter's body, I only examined the head-gate and dam of the canal company as it was practically impossible for a floating body to pass either one of them. I did not seine the river; I expected to find his body floating on the water; no one ever asked me to make this search. Exhibit attached to deposition as to stages of water to be attached.

I never heard of anybody being drowned at the place where Hunter's wagon was found; have never been at the place that I know of.

J. W. PREWIT testified as follows by deposition taken June 11th, 1898.

Am 56 years of age; reside at Pecos city, Reeves county, Texas, where I have resided for about six years; before moving to Pecos I resided at Crockett, Houston county, Texas. Am a farmer and stock raiser and have been since I moved to Reeves county. Do not know W. A. Hunter; once saw a man with Mrs. Mettler whom I learned afterwards was W. A. Hunter. From circumstances I have been able to fix the date when I saw Hunter at about December 3rd, 1896; saw him in Pecos, Texas. I know Mrs. Jennie M. Mettler. When I saw Hunter in Pecos about December 3rd 1896, he was standing near a wagon with two horses hitched thereto, one was a dark bay or brown horse, 10 or 12 years old and about 15 hands high; the other was a light or bright bay horse, medium size; did not notice him particularly. I had seen the brown horse before, knew him well; it had been in my possession and in my pasture north of Pecos about twelve miles; was in my possession for about twelve months. I used him while in my possession, rode and worked him; we called him "Ginger;" saw the horse twice on the 3rd of December 1896; it was at the same place both times; think he belonged at that time to Emerson Powers; saw A. W. Hunter and Mrs. Jennie M. Mettler together on December 3rd, 1896;
653 think it was about 10 or 11 o'clock a. m. Saw them at Heitman's back lot; both were standing near the wagon talking; Hunter in front of the horses; horses were then hitched to the wagon. I used the Emerson Powers horse both as a saddler and work horse; used in camping out; never had him with me on but one camping trip; was then out about two weeks; this was in 1893 or 1894; went from my ranch on the Pecos river to the Davis mountains about sixty-five miles south from Pecos; have had considerable experience in camp life in the Pecos country since I came to Reeves county; have hunted and fished an- taken several trips to the Davis mountains; I knew the traits and habits of horses during the time he was in my possession; considered him a good camp horse; never had him to leave the camp when loose or unhitched; he was a good camp horse; would always remain at or near the camp when turned loose. George W. Boyer owned the horse when I first knew him; he was next owned by Daggett, then by Emerson Powers. During all the time I knew the horse he was kept on the west side of the Pecos river, except a short time when he was in the possession of B. P. Van Horn. The town of Pecos is on the west side of the Pecos river; I kept the Emerson Powers horse about twelve miles north of Pecos on the west side of the river; then resided about five miles north of the Pioneer Canal Company's dam across the Pecos river; do not know of my personal knowledge where the Hunter camping outfit was found, but have known where I have been informed it was, on the opposite side of the Pecos river from my place, that is, on the east bank of the river, my place being on the west. When the Powers horse was kept by Daggett he was kept

about seven miles south of my place on the same side of the river; Powers kept him in and about Pecos city and on the same side of the river; this horse was also kept for a while by P. B. Van
654 Horn at or near Grand Falls in Ward county, Texas, about forty miles from my place and on the east side of the river.

Plaintiff offered answers of J. W. PREWIT to cross-interrogatories propounded by her.

In 1880 I resided in Crockett, Houston county, Texas; removed to Reeves county in 1891 where I have resided ever since. Never knew W. A. Hunter; was told that the man whom I saw with Mrs. Mettler on December 3rd, 1896 was her brother and that his name was Hunter. Have known Mrs. Jennie M. Mettler by sight since October or November 1896; was not acquainted with her husband. Am acquainted with R. C. Milliken; he told me himself that he was representing a life insurance company; met him at my house about one year ago; have had but one conversation with him since January 1st, 1897; this occurred at my house sometime during the month of February or March this year (1898) — the town of Pecos, Reeves county, Texas. Milliken told me he had examined the Pecos river for the body of Hunter; would not expect to find the body of a man in the Pecos river a month or a month and a half after he was drowned, such an expectation is not a reasonable one. Milliken has never been to see me with reference to taking my deposition; he came to see me for a description of the horses that Hunter drove to the wagon from Pecos, more particularly for a description of the brown horse; gave Milliken a written statement in reference to this matter the first time I saw him; he wrote it himself; have no recollection of signing and swearing to the statement; have never seen the statement since it was made. It is true that a horse which has a reputation of standing will sometimes leave or go off when left untied. If the Powers horse had been left tied at the camp and had got loose I do not undertake to say that it would have been strange, improbable or suspicious for him to leave camp and undertake to go home; any camp horse is liable to leave camp sometimes.

655 Whereupon the court adjourned until 10 a. m., Thursday May 31st, 1900, on which date the court re-convened at the hour named and

PATRICK CARSON testified by deposition taken on the 10th day of June, 1896, as follows:

Am twenty-two years of age; reside in Barstow, Ward county, Texas, and did during December 1896; was engaged in the drug business, and was also deputy postmaster; I kept my own books; kept nothing but a ledger and blotter; books were correctly kept as to charges and entries made therein, both as to goods sold and dates of entries; sold drugs for cash and on credit; entries were made on

all credit sales; I made all entries of sales made in December 1896; entries were first made on the blotter and all such entries were made at the time the sale was made. I was acquainted with R. H. Kissee and his wife in 1896; they were customers at my store and made purchases both for cash and on credit; sold them medicine during the first week in December 1896; entries of such sales were made on my books at the time the sales were made. On December 1st, 1896, sold them one package of Simmons' liver regulator; on December 5th, 1896, sold them one bottle of Hall's catarrh cure; both items were charged to R. H. Kissee on my books; first entries of these sales were made — the blotter; I made the entry and sale of Hall's catarrh cure myself and the article was sold on the 5th of December 1896. Have carefully examined my blotter for the month of December 1896 and find this to be the only sale of Hall's catarrh cure sold to Kissee during December of that year.

Plaintiff offered answers to cross-interrogatories by PATRICK CARSON, which are as follows:

I am acquainted with R. C. Milliken; do not know what business he was engaged in in 1897; met him first at Barstow, Texas, in January or February of 1897. He at one time paid me one dollar for information concerning entries on my books; he came to Barstow only one time to see me with reference to taking my deposi-
656 tion; I gave him a written statement with reference to this matter but do not remember when it was given; he wrote the statement himself; I signed it but I do not think I swore to it; have never seen the statement since I signed it.

Capt. A. D. IRVIN testified by deposition taken June 6th, 1898, as follows:

My age is 58 years. Reside at Barstow, Ward county, Texas, now and on December 4th, 1896. I was elected sheriff of Reeves county in 1898 and served full term; I saw the large bay or brown horse known as the Emerson Powers horse December 4th, 1896; his condition was not good; horse was standing back of Ed. Brady's lot; saw the horse between the hours of 8 and 10 o'clock in the morning. On the morning of December 5th, 1896, the Emerson Powers horse was standing at my lot; I left on the morning of the 5th and returned two days thereafter and the horse was still standing at my lot, trying to get some corn I had stacked in there; I took the horse across the railroad and left him; I took a piece of rope off of him. The horse is dead; he died in about a week or ten days after the 4th of December 1896. I went to feed my hogs on a certain day early in December 1896 and when my son, Seth, and I reached the narrows, a place on Pecos river about nine miles below Bristow, and as we passed a certain place Seth made the remark "Just one year ago I camped right there;" this is how I come to remember said date. A rope about 12 feet long was on the horse's neck; the rope was free from all dirt; its size was one-half or three-fourths of an inch. I

removed the rope from the horse's neck sometime between the 5th and 10th of December 1896, and turned it over to the county clerk of Reeves county, and Mr. Milliken; that is the last time I saw it. If the rope had been dragged by said horse for a distance of twelve or fourteen miles, I think it would have shown it; it would
657 have been worn slick and smooth. I did notice it but it did not show being dragged. I have had horses out at doubtless all seasons of the year in the same locality as that in which the Powers horse was; the rope would wear smooth, and have no frazzles; it would have been dirty, would have shown the wear but this rope was not smooth, but rough and looked like a rope that had been used only about a place or house.

Plaintiff offered the answers to 5th, 7th and 8th cross-interrogatories to Capt. A. D. IRVIN:

I know R. C. Milliken; do not know but suppose he was a detective, he did not tell me his business; I met him at Barstow in the winter of 1896 or 1897. Mr. J. B. Gibson introduced me to Mr. Milliken. Mr. Gibson is county clerk of Reeves county. Our meetings since then were casual, and have had two or three conversations with Mr. Milliken. Saw him in McCullough's store and he came to my house twice; this was in Bristow; no private conversations have ever occurred between Milliken and myself; I think Mr. McCullough was present at the store, and my family was present while he was at my house. I know nothing about the search of the Pecos river for the body of W. A. Hunter; I would not expect to find the body of a man a month and a half after he was drowned in the river, such an expectation is not reasonable. I gave Mr. Milliken a written statement taken before the clerk of this county; I did not write it, either the clerk or Milliken wrote it; it was typewritten. I signed and swore to it before the clerk; read the statement myself; have never seen it since I signed it; think Mr. Gibson was present when Mr. Milliken first spoke to me in reference to when I saw the Emerson Powers horse back of E. J. Brady's lot. It may have been that I was not certain as to the day until I recollected what my son Seth had said about camping. I do not remember having made any statement about it being the 10th or 14th of December. I do not think that December 4th is wrong; the above statement is true to the best of my knowledge; I do not remember Mr. Milliken asking me whether it was the 4th
658 of December; we were all trying to remember the date and I do not remember Mr. Milliken suggesting the date to me; I do not remember Mr. Milliken's statement in reference thereto. When I first saw the horse he was about 100 yards from my place; he was about forty yards from me when I first saw him; I went to the horse and took hold of him; I do not think any one saw me; he was around Brady's and my place four or five days before I took him across the railroad below town. Some time between the 5th and 10th the rope was removed; I removed it; this was before the

horse died. I noticed the rope when I took it off; I noticed that it was not dirty or stained when I took it from the horse's neck. Mr. Gibson, Mr. Milliken and myself were all talking about the rope; I do not remember whether it was dragged through mud or not. I haven't been shown the interrogatories propounded to me, either direct or cross. R. W. Thomas was present while the officer was taking my deposition; he was writing the answers to the interrogatories; the answers were not written out before I came to this answer; I have used no memoranda, written or otherwise. Mr. Milliken is in Barstow today, he was not here yesterday that I know of; only once have I been before said officer to give my deposition.

W. B. Oats testified by deposition taken on the 11th of June 1898 as follows:

Am 38 years old; reside in Pecos city, Reeves county, Texas, and have since December 1893. From December 1893 to March, 1898, was engaged in the livery business; am now working on cattle ranch. Was slightly acquainted with W. A. Hunter; last saw him at my grain house in Pecos about 10 a. m. on the 2nd or 3rd of December 1896. About one week prior to December 3rd, 1896, Hunter and Mrs. Mettler took a horse from my stable which had been left there for Mrs. Mettler. Hunter never did put a horse in my stable himself. At the time he took the horse out of the stable I sold him one bale of alfalfa which I delivered to him at H. H. Heightman's house.

659 On the day Hunter left Pecos I sold him three bales of alfalfa. He had a two-horse wagon with him at the time he purchased the hay which was loaded into the wagon for him. This last purchase of hay by Hunter of me was on the 2nd or 3rd of December, 1896. The horse had been put in my stable for Mrs. Mettler; she was with Hunter when the horse was taken out; it was a medium sized brown horse; it was sent to the stable from Johnson's range in Winkler or Loving county. Have been working with horses in Reeves county both winter and summer for about thirteen years. Horses taken off the range in *in* Reeves county in winter are usually very weak and not fit for a spell of harness. It has been our custom to feed range horses when taken up in winter from eight to ten days before using them. The effect of working a horse which has been running on the winter range depends largely upon the kind of grass upon which the horse has been grazing; if he has been grazing on salt grass he is liable to die if used before feeding him on grain or hay; if he has been grazing on other grasses which grow on the range in this country he is not so liable to die but is too weak to endure the hardships.

On cross-examination witness testified:

In 1880 I resided in King county, Texas; was engaged in the cattle business then; went from King county to Lipscomb county, then known as "No Man's Land," in 1881. Was engaged still in the cattle business from 1881 to 1882 or 1883. Was in Archer and

Wichita counties in cattle business, then removed to Motley county and remained there a year or a year and a half; after this came to Reeves county, where I have since resided. Had know- W. A. Hunter about one week prior to December 1896; never met him except in one or two business transactions; met him a time or two at my place of business; have known Mrs. Jennie M. Mettler one and a half or two years; didn't know her husband, S. L. Mettler; he never did reside at Pecos. Mrs. Mettler came to Pecos soon after her husband's death. So far as I know the life of Mrs. Met-
660 tler, prior to December 1896, was an honest and moral one. Am acquainted with R. C. Milliken; think I first met him at my stable in Pecos. Since January 1st, 1897 have had numerous conversations with Milliken, but never had but one conversation with him concerning this matter, which was at Johnson & Heard's saloon in Pecos, sometime in 1897; no one was present at this conversation.

Mrs. E. J. BRADY testified by deposition taken June 8th, 1898, as follows:

I reside in Reeves county, Texas; am 41 years old; December 1896 I lived in Barstow, Ward county, Texas. I saw the Emerson Powers horse standing looking over my fence into the back yard; the horse was thin and very bad looking; I saw the horse on Friday, December 4th; it was early in the morning, just after I had gotten up that I saw the horse. My house is about 150 yards from the Texas and Pacific depot. G. M. Southard's lot was nearest to the depot; no obstruction between it and the depot that I know of; it was about 50 yards from the depot and is on the Grand Falls public road and no obstruction between the depot and said road. I saw the horse every day until the morning of the 9th of December; he was around my house all the time between the 7th and 9th of December; he followed me when I went to water my horse; the horse was looking very thin, and I made inquiries of different people if they knew who he belonged to; he had a piece of rope on him. I was taken sick on the 9th of December, and did not see the horse again and did not know what became of him. The reason I can place the date when I first saw the horse, is that Mr. Milliken came to see me about the horse, and the occurrence being fresh in my memory; I remember the day of the week that I saw the horse and I remember distinctly the day of my being sick and it was on Friday but I was taken sick on the 9th. I remember this special sickness because I was very sick for a long time.

661 Mrs. R. H. KISSEE testified by deposition taken June 13th 1898 as follows:

I now reside in Pecos, Reeves county, Texas; in December 1896 I resided in Barstow, Ward county, Texas. Am not certain as to the time, but it was sometime during the month of December, 1896, at Barstow, Texas, I saw the horse known as or called, the Powers

horse; never saw the said horse but one time and then at about twelve o'clock at night; took him to be a medium size brown or dark bay horse; had a short rope tied about and hanging from the neck; can not give any further description of him, cannot positively fix the time when I saw the horse as being in the month of December 1896; if it was in December, cannot state what day of the month—there are facts and circumstances which enable me to fix the date on which I first saw the said horse at Barstow; on the day preceding the night on which I saw the horse, my brother, C. A. Irvin, came to my father's house at Barstow; he was sick at the time. Mother being unwell requested me to remain at the house over night and set up with my brother. At about 12 o'clock during this night my attention was attracted by a noise on the outside; went out to see what caused it; found the horse to which I referred, standing on the outside of the lot eating cane piled up on the inside of the lot; thinking it was my brother's horse went outside to examine him, found him to be the horse above described, which I afterwards learned was the Powers horse; think it was in December 1896 that my brother, C. A. Irvin, came to my father's house and remained there several days on account of sickness; had rheumatism, also catarrh of the head; purchased a bottle of Hall's catarrh cure for him at Patrick Carson's drug store in Barstow; this purchase was made on the evening before I saw the horse; bought the medicine on a credit and had the same charged to R. H. Kisee.

662 Mrs. M. H. MANNING testified by deposition taken on June 10th, 1898, as follows:

Am 45 years of age; reside near Pecos, Reeves county, Texas; was residing on Emerson Powers' place, near Pecos city, on December 2nd, 1896. I know Mrs. Jennie M. Mettler; never met W. A. Hunter but one time. Mr. Hunter and Mrs. Mettler came to my house on the 2nd day of December 1896; Mrs. Mettler wanted to get one of Mr. Powers' horses to work to Mentone, Loving county, Texas. Mrs. Mettler said on this occasion that Mr. Powers had promised to let her have a horse whenever she wanted it; that she wanted a horse for her brother to work to Mentone; they got a big brown horse, called by us "Brown," hitched him to a wagon while at my house and worked him off. He was a medium dark brown horse, broke to work and ride; Hunter did not say for what purpose they wanted the horse; said would want the horse for two or three days. Mrs. Mettler and Mr. Hunter came to my house together.

Miss LULA IRVIN testified by deposition taken on June 7th, 1898, as follows:

Am nineteen years of age, and reside at Barstow, Ward county, Texas, and did in December 1896. I saw the large bay or brown horse which W. A. Hunter left Pecos Texas with on December 3rd, 1896, but do not know whether it was known as the Emerson Powers

horse; the horse was very poor; saw it at Mr. E. J. Brady's lot in Barstow, Texas, on Friday, December 4th, 1896; the said lot is about two hundred yards from the Texas and Pacific depot. G. M. Southard's lot is nearest to the depot; no obstruction between said lot and depot; I think I saw the horse during the afternoon about 2 or 3 o'clock about 100 yards distant; the said lot is on the public road; the Grand Falls road and no obstruction between it and the road. I saw the horse again on Saturday at our place, and I think he stayed until Monday when papa (A. D. Irvin) led him down
663 the ditch. I fixed the date when the horse was first seen by me in Barstow by the circumstance of getting medicine at Pat Carson's and by my brother, Seth, stating that he spent last night in the same place that he had spent the same night of December 5th, 1895.

JNO. SWARTS, being sworn in behalf of defendant, testified:

I reside at Fort Worth, Texas, and have about six or seven years; am acquainted with Mrs. Mettler, the plaintiff; have known her about 15 years; I know W. A. Hunter; have known him about the same length of time; I knew him at Fort Worth, Texas; was once in my employment; assisted in waiting on customers; I think it was in the year 1896; he came to Fort Worth the first part of the summer and stayed there during the summer; do not know what month he left; think he was there about three months. I was well acquainted with Hunter; he boarded at three or four different places, roomed at the gallery, my place of business; I last saw him late in the fall, either November or December; he was there in Fort Worth; came to Dallas after he left Fort Worth and was there a few days.

Witness was asked whether Hunter had a valise of any character, if so, describe it. He had a small hand grip, as well as I remember (pointing to a small hand grip on the table). It was a dark tan color. Think he left my employ in July or August; he came to Dallas after he left Fort Worth; he was here several months before he went West I suppose.

On cross-examination witness testified:

I slept at the gallery part of the time. Have known Hunter about fifteen years; first met him in Fort Worth; was in my employ part of the time, two or three months in the summer; he was not getting much salary; he was unemployed and making his expenses; I think, as well as I remember he had a grip something like that pointed out. I don't remember his having a large grip, one of those cloth grips that slip up and down, telescope. I
664 do not undertake to say he did not have one; I don't remember whether he had one or not.

On redirect examination witness said:

I never saw any other valise owned or claimed by Hunter than the one I have described.

Mrs. J. B. MILLER, being sworn on behalf of defendant testified as follows:

I reside in Forth Worth, and have since the 1st of last March; prior to coming to Fort Worth I lived in Pecos about seven years, and there made the acquaintance of Mrs. Jennie M. Mettler and Mr. W. A. Hunter; I had known Mrs. Mettler a year, I guess, and had only known Mr. Hunter a few months; he stopped at our hotel a few times; we were in the hotel business; I remember Mr. Hunter being in the hotel about the 1st of December 1896; he came in there on the night train about 12 or 2 o'clock, the next morning he settled his bill and said he was going to visit his sister, he came back in a little while in a wagon and got his grip and overcoat, and said he was going out to Mentone; I observed he had a bed in the wagon, and what appeared to be a camp outfit, I did not notice particularly; am sure I saw some bed quilts, and blankets etc.; do not remember that I saw a stove; he got his overcoat and grip; the grip was something the size of that (pointing to the same hand-grip designated by witness John Schwartz, which is about 15 inches long, 8 inches high and 5 inches wide) it was a shoulder strap grip, a plain red grip as I remember it. He took his grip and overcoat and put it across his shoulder and got in the wagon; he went towards the depot from our house; I think that is east; it was his direction to Mentone; that is the way he told me he was going.

On cross-examination witness testified:

Mr. Hunter left our hotel with the wagon as well as I remember about 10 o'clock; that was the next morning after he come in at night, as well as I remember. I did not go out to the wagon
665 and did not make any examination at all and only testify from a casual observation of the wagon; the bedding is the only thing I noticed particularly.

A. M. RANDOLPH, being sworn on behalf of defendant, testified as follows:

I reside at Pecos city, Texas, and have for nearly thirteen years; am county surveyor and have been for twelve years; am a surveyor and engineer. I have made a map and photograph of the bank of the Pecos river where it is alleged Mr. Hunter made his disappearance. (The map is here shown witness, and he identifies it as the one made by him.)

In explanation of the manner in which the mapping was made and how he arrived at a photograph of the bank, witness said he used a rod and tape-line and measured the different heights and distances as indicated on the map and that it represented a true photograph of the bank as found by the witness at the time he made the measurements.

I have been to the place where the accident is supposed to have occurred three times; I only know that I visited the exact spot from the testimony of others; went there the first time about a year ago,

which was in 1899, 10th of May, and in April 1900. Mr. Milliken pointed out the place I visited where it is alleged Hunter was drowned. He employed me to go on the first trip, and also had me to go on the second. The first time I went to said point Mr. Milliken, Mr. Slack and Mr. Estes were with me.

Mr. H. C. SLACK was here introduced and identified the point which was pointed out to the witness, A. M. Randolph, as the correct one where the camping outfit of Mr. Hunter was located, and the exact place where Mr. Hunter is supposed to have got into the river, and stated that as the exact point so pointed out to Mr. Randolph at the time of their visit, whereupon Mr. RANDOLPH was re-
666 called and further testified as follows:

The map drawn by me is a true photograph of the bank where it is supposed Mr. Hunter fell in.

The map is here introduced and the entries, distances, measurements and locations *testifies* the different articles testified to are indicated in the purported note on the map and are self-explanatory.

Witness further testified: That he had lived on the Pecos river about thirteen years and was well acquainted with the nature and character of the stream; that the duties of his office did not require him to know anything more about the stream than in land surveying and running lines along the stream. I have crossed the stream many times at different places and never had any difficulty in making a crossing; I have crossed in *in* the day time and in the dark on horseback; at two of the places I crossed it had fords and the other places where just wherever I happened to strike the river and I could get down on the bank and up on the opposite side; I do not think there is any danger in crossing the stream. I know nothing of the velocity of the stream except by measurement with floats, using floats in the current; I have had occasion to make investigation of the velocity of the stream in the vicinity of where Hunter is supposed to have fallen in; the stream runs northwest and southeast at said point; it is straight for some considerable distance; I should think about six or seven hundred feet it would be almost perfectly straight. I measured along on the bank with a tape line parallel with the current 1/16 of a mile and at a point where I can put in a float and time it to the end of this measurement; that disclosed the current to be two miles in sixty-four minutes by that measurement; the condition of the stream was what we call low; not as low as it does get. The stream was falling on the day on which I made the measurement horses were ridden into the river, being
667 the point where Hunter is supposed to have fallen in; they were ridden in about fifteen yards above; I did not notice the depth of the water nor how high it came upon the horses at the time but noticed afterwards that they were wet about half up their sides; the horses crossed the stream; there was no ford anywhere along there. (Witness was handed three photographs, and upon examination said that he remembered one and that he was acquainted with the

parties whose photographs were taken thereon.) Mr. R. C. Milliken took the photographs at the time we made the measurements on the bank May 10, 1899. Witness identified the photographs marked exhibits.

On cross-examination witness said:

I have attended court at Dallas twice before this; I made the map offered in evidence May 1899; was employed by R. C. Milliken; the map is a correct map of the river at the point that was pointed out to me at the time I made it in May 1899; I do not pretend that this is a correct map of the river in 1896; I am fairly familiar with the current of the river; cannot say that it frequently changes; it is true that during a rise the river frequently throws up sand beds, that on this side of the river there is no sand bed, and in two or three weeks or a month there is a sand bed there; when the rise falls it leaves the sand bed; I do not think that it is true that the river is known as a quicksand river; do not think there is quicksand in it; never heard of any cows being stuck up in the quicksand. I quit work for the T. & P. a year or two ago, I think a year ago this past March; my connection was severed with the T. & P. and my employment ended because it was contended that I did not turn over funds collected. The Pecos river runs through a country where there is a great deal of sand in the river valley. The Pecos river has steep banks; it is noted for that.

On redirect examination the witness said:

I have a fairly good judgement of distances and in my judge-
668 ment the average width of the Pecos river would not exceed one hundred feet. At the time I made the measurements on the bank of the river I saw no signs of any recent change in the bank, and when I was again there in April of this year I noticed no igns of any change since I had been there in May of the year 1899; it looked about the same way. I was on the opposite side from where the survey was made. I made some measurements from this point to the Pioneer Canal dam. The distance from the point where the measurement- of the bank were taken and the point where it is alleged Hunter fell in the river by the meanderings of the river to the dam is 4 7/10 miles, straight through it 3 7/10. I made a plat of it.

On recross-examination witnes- said:

The river is not perfectly straight from the point where I made the measurement to the dam, it is winding; when I made the measurement between the two points I had two Mexicans and my son with me. Along the Pecos river there is brush in *in* places pretty thick; not much trouble to get along to a person on foot from the camp down to the dam; the thicket is not thick enough to give a footman trouble. In making the measurement I did not go around all the bends nor into all the bends. My survey shows the distance around

the meanderings at 4 7/10 miles, but I did not measure the distance by going around the bends and following the meanderings of the river. I made the measurement in the same way that I would make it if I were making a survey of land but that is not an accurate measurement and the distance of 4 7/10 miles would not be the distance if the meanderings of the river bank were closely followed. I had a conversation with J. B. Gibson, county clerk at Pecos, after I had been up the river and made this survey; I did not tell him that by following the meanderings of the river it was all the way from 10 to 12 miles, but stated to him what I have stated here, that the distance was 4 7/10 miles. He said that he did not think it was correct and that he was going to write to you (speaking
669 to the attorney conducting the cross-examination) and have a survey made. I did not say it was all the way from 10 to 12 miles; only said that I made a survey of 4 7/10 miles. I cannot tell how near I followed the meanderings; I followed it as we usually follow the meanderings in making a land survey, and the survey would be substantially correct without following all the little crooks and turns of the river; I showed Mr. Gibson on the county map how the survey was made.

On redirect examination witness said:

The survey was made as a land survey would be which is not exact but by reason of the crooks is very small. Surveyors guess at the meanderings of a river. The river is very crooked.

D. H. Scott, for defendant, being sworn, testified as follows:

I reside in Dallas and am a photographer by occupation and have been about eighteen years. (Witness was then handed a lot of photographs of films and said that he had developed them; that Mr. Milliken gave him the films; that the development of a film gives a true representation of the object as it was taken by the camera as nearly as possible in photography; that the least light on a film and the least thing touching it would destroy it at any time between the taking and the time it was developed.

On cross-examination witness said:

Photography cannot be deceptive in developing; you can handle your camera in such a way that an object will look almost any way you want it; you can do so to no great extent in taking a picture; the perspective has a great deal to do with it.

Q. Suppose I was to stand up with a fish in my hand and stand back behind it with the fish held out in front of me, what would be the relative size of the man and the fish; the fish would be larger and look to be about as long as I am?

A. No, sir.

Q. Can you make a fish look as large as a man?

670 A. Yes, if you hold it far enough away. I do not think you can take an object so as to pervert its real looks; cannot

pervert its real size to any great extent; you can make a white man look like a negro, but that is done after the picture is taken, and is done by light; and is done by toning and holding back the light so as to make the negative look darker. You can pervert an object in that way; it is not done in development.

Q. Suppose you stood here and took that white wall, would it look like it was at an angle or straight?

A. That would depend on a proper elevation of the camera.

Q. It will depend on the handling of the camera?

A. No, sir, not in these small cameras.

Q. If you take that wall with an ordinary kodak would the wall look straight or look like it was at an angle?

A. No, sir, it depends on where you hold your camera; I can hold the camera and pervert it and make it look different from what it is in the plate.

Q. Not in the bank?

A. No, sir, there is too much difference to make any great change in that; in that you are too close.

Q. Can you pervert the bank as well as you can the building?

A. That would depend on how close you were to it; you could alter it to some extent.

Q. You can make a bank look like it had brush on it when there is none on it?

A. No, sir, and you can not handle your development in such a way as to do that.

Q. In making alterations of a picture, such as by handling your brush in such a way as to take wrinkles and beard off a man's face in a picture, that is done after the negative has been developed; you can make an object look six inches longer than it is in the prospective.

671 On redirect examination he said:

You can do this when the object is close, but it has to be very close; it cannot be done with an ordinary little snap shot at close quarters; anything in the distance cannot be done in that way; it is true that a camera within its range takes an object correct where the objects are the same relative distance; if one is beyond the other the furtherest would be smaller in proportion to the distance; these changes I have spoken of are made by changing the position of the article photographed. Taking these photographs and as a scientific man as to the true representation of the matters they purport to represent, I consider them correct: I developed them correctly; I did not do anything to torture them in developing.

On recross examination witness said:

If one or two objects is a little behind the other they would not appear to be side by side; if you show the surface they are standing on it would show the distance.

R. S. JOHNSON being sworn in on part of defendant, testified as follows:

I am the R. S. Johnson spoken of by Messrs. Gibson and Mettler as being one of the persons who went up to investigate Hunter's disappearance; I went on the 29th of December 1896; I investigated the place at the camp. (Here photographs were handed to the witness) and witness recognized himself as one of the parties photographed, and said it was taken right on the spot where Hunter is supposed to have gone into the river. Witness also recognized Mr. Henry Slack at the point where the root or limb went into the bank.

Question by COURT: Is that a true picture?

A. Yes, sir.

Witness then identified photograph taken when he was not there and identifies the witness- J. B. Gibson and Henry Slack.

672 On cross-examination witness testified:

These photographs were taken on May 29, 1898. Mr. W Milliken, Henry Slack and Mr. Tulk were with me at the time. Mr. Milliken operated the kodak. When the picture was taken he was standing out in the river is my recollection.

Witness then drew the course of the river on a piece of paper and marked the points of the compass thereon.

Mr. Milliken did not cross the river when he took the photograph which I have identified. The river at that point is about 87 feet wide and he stood out in the water about twenty feet from where we were when he took the pictures and in the water probably eight or ten feet from the bank; he waded out in the water and stood on the bed of the river; I think he took his pants off; he took the photograph angling, about 20 feet distance; he did not take it on a line parallel with the bank. The bank is principally straight at that point up and down as shown by the map handed the witness. (Witness designates that point where all the parties were sitting as shown in the photographs and shows where the straight bank is.) I do not think it is four or five feet high; I do not think it over two and a half feet high and it was right in the straight part of the bank; of this two and a half feet bank; right under Mr. Slack's feet. The crook in the river as shown in the photograph is about 150 yards above, nearly 200 yards from where we sat; that is a correct picture of that bank as it was. (Pictures marked "A 1" "A 2" and "A 3" were admitted in evidence.)

LEE JOHNSON for the defendant being sworn testified as follows:

I reside at Fort Worth; have lived at Pecos; lived there from 1885 to 1897; was merchandising the first year and then I was in the cattle business; I have a ranch and have had for a number of years in Reeves county Texas; am acquainted with the physical character of the Pecos river; at times it is very boggy and at other

times it is not; I have known many thousands of cattle to be
673 bogged in the river at different times; except at a few places the river is not boggy; except when it is low; as a rule it is not boggy when it is low; it is boggy during and after a rise; it is the same all along, including the place where it is supposed Hunter met his accident. It is frequently so that cattle get into bogs and are unable to get out; the only way they can be got out is for the boys to strip and go in there and get them out; that is done by constantly walking around the body until you push the sand below the animal and drag it out. When a human being goes in to tramp the sand it has no effect on him.

On cross-examination witness said:

I suppose the temperature of the Pecos river would be colder in the winter. One substance sinks in the quicksand like other bodies under similar conditions. My explanation of why a cow will sink in the sand and cannot extricate itself and a human being does not so sink is the weight of the body and the amount of surface on the sand.

H. B. TAYLOR, sworn for defendant testified as follows:

I live in Dallas; resided part of one summer in Reeves county and part in Loving county; knew W. A. Hunter; got acquainted with him in the Pan Handle at Quanah about 1890 or 1891; do not think he could swim. Have seen him try; think he came out there in the fall of 1893.

On cross-examination witness said:

Hunter was not in Loving county or at Pecos at the time of the priginal organization of the county; he was there at Quanah or Denison then; cannot say exactly when he came after the organization but think it was in the fall; I am somewhat familiar with the Pecos river; went in it parts of two years; I consider it a dangerous river at times; I do not feel that my acquaintance
674 with the river is sufficient for me to testify as to its condition, etc. I think it is boggy and considered it dangerous on that account. I think it carries a great deal of sand all the time when it is up; the water is full of sand pretty much all the time I think; sufficient to color it some.

D. G. WALLACE, witness for defendant, testified by deposition taken *de bene esse* as follows:

On direct examination:

I was born in Ireland; came to this country when about six or seven years old; I think in 1854 or 1855; landed in New York and went from there to Pittsburg when about seven years old, then went to Cincinnati and resided there a short while; from there to Newark, Ohio, and lived there between twenty-five and thirty years; from

Newark, Ohio, I came to here Nashville, Tennessee; have been here nearly nine years; my age is 53 years; am working for P. F. Collier of New York, selling books and have been since coming to Nashville; sold books for them a year or so before coming to Nashville; while I lived at Newark, Ohio, I sold dry goods there for several years until the parties made an assignment and went out of business; I afterwards worked for different parties. I worked for the Newark Advocate Printing Company and the American Printing Company. The Advocate Company was in the business of printing papers and paper book binding business; the firm was engaged in doing job work and printing a daily and weekly paper; while residing there I knew brothers of the Hunter family that lived in Homer, Ohio; it has been a long time since I saw any of them; I solicited for this paper (the Advocate) through the country; solicited the houses to take the weekly paper; it has been about 12 or 13 years since then; in January of 1897 I met one of the Mr. Hunters, formerly of Homer, Ohio, in this city; I met him in Flourishe's cigar store, corner of Church and Summer streets.

674½ While I was in there I saw a stranger in there, he looked like a stranger to me, and I says to him, "I see you are a stranger in this city" and he says "Yes" and I said "Where are you from?" and he said "I am a sheriff from Texas" and he says "Where are you from?" and I says "From Newark, Ohio" and he says "I am from Homer, Ohio" and I says "What is your name?" and he says "William Hunter" and I says "I know your family well" and we shook hands and were glad to see each other, we were from the same county. Well, while we were talking he says "I know your brother in Newark, Ohio, kept a dry goods store; I expect they have sold me plenty of goods" and I said "I expect I have sold your folks goods" and he says "Yes no doubt you have," and he says "I have a notion to go into business" and I says "What kind of business are you going into?" and he says "The real estate business" and I says "That is a very good business here" and then he says "I would like for you to come down to see me at my boarding house" and I did not ask where his boarding house was or anything like that and the conversation dropped there finally. (Witness was here shown a photograph that was marked on back of it "Exhibit E," Buford Duke, R. Stebottom and R. A. Henry with other pictures) He was asked to state which of those pictures, if there is a picture of the man that witness talked with in January 1897 in Flourishe's store, to which he answered that the one with the paper in his hand reading, on the left hand side. Witness stated that he first saw this picture at the police station in Nashville a couple of months before his deposition was taken, among some twenty odd other pictures which were exhibited to him with this one and that he picked out the one marked as "Exhibit E" aforesaid as the picture of the man with whom he talked and has just been identified by him. At the time of the conversation with Mr. Hunter in Flourishe's store witness was a subscriber for

a paper published in Newark, Ohio, (the Newark Advocate) After seeing Mr. Hunter in the cigar store he saw a notice about him shortly thereafter in the Newark paper which notice stated that a sheriff from Texas was drowned and they had found one
675 of his horses frozen to death and they found another feeding the same place; that it could not have been more than three or four days after he met Mr. Hunter in the cigar store until he saw that notice in the Newark paper; that he mentioned the fact of seeing this notice in the paper and having seen Mr. Hunter a few days before to his sister-in-law and her family; also mentioned it to Mr. Turner who is now dead and Mr. Flouri-h, the cigar man; and I wrote to the Advocate Printing Company; I did it from courtesy to his family to let them know that he was not drowned but that I shook hands with him on the corner of Church and Summer; I thought the family would feel better to let them know he was living; I did not have any other purpose but for the family's sake; I afterwards saw a notice in the paper acknowledging receipt of my letter but the paper did not state correctly where I had seen the man; it said in a street car and i did not meet him in a street car, I met him in a store; I did not say anything about a street car in the letter at all; I did not preserve a copy of the letter I wrote to the Advocate and I did not preserve a copy of the Daily Advocate; I left it at home and think burned it up or used it after reading the home news. After I sent this notification to the Newark Advocate I got a letter from a relative of Mr. Hunter; I think it must have been a brother-in-law; I do not remember his name; I did not keep this letter and do not know where it is. I very seldom keep letters, generally burn them up; it asked me to give a description of the man and I gave it to them as far as I could but after then I never heard any more about it. They asked me for a description of the man I saw in Flourishe's store. I did not get any reply to my letter in that account published in the paper at Newark giving the death of Mr. Hunter, they gave his death at a time prior to the time that I saw him in Flourishe's store. I am in no way connected with the Fidelity Mutual Life Association of Philadelphia; I do not know Mr. Milliken, never saw him at all. I never saw Mr. R. A. Henry of this city only when he called on me; I did not know him at the time I saw Mr. Hunter in the cigar store here; after that I went away and was in Alabama; when I came home my niece says "There is a card laying here for you" Some man named
676 Henry and I says "What on earth does Henry want with me I don't know that man: I says "I will go up town and see" I saw he had his office in the Homestead building and I went up and asked him his business, what he wanted with me; that was a long time after I had written the letter to the Advocate. Let's see, I was in Alabama I think in August or September; I do not know which it was; when I came home from there; it was August or September 1898, I don't know which; I know it was pretty hot down there in that country selling books.

On cross-examination:

Witness was asked what did he have to say to you when you met him?

A. It is natural you know for travelling men when he sees strangers to ask where they are from.

Q. The man Mr. Henry?

A. He just asked me about this man. Henry wanted to know where I had met him, this man, and just asked me about the case, asked me, well, just about the same repetition that Mr. Stokes asked me. I can tell you just the same and repeat to you if you wish. (Witness was then made to repeat the conversation) between himself and Mr. R. A. Henry which was as above detailed on the witness stand and added that he went home and I says to my sister-in-law "I met a man from Licking county" and she says, "I am glad to hear it; glad to meet somebody from home; I saw him (Henry) two or three days after that and I got the paper from home that said Mr. Hunter had been drowned from Texas and we both laughed over it, that is the same man that I shook hands with in Flourishe's store and told him then that I put a notice in the paper through courtesy to the family to let them know because I knew the Advocate would put in the weekly here so they would see he was not drowned. After I got that paper from Newark I went and showed it to Mr. Turner: he is now dead; this is the detective Turner, and I said to Mr. Turner "I believe there is something crooked about this man; I saw in the paper this man was drowned and I says I shook
677 hands with that man in Flourish'es store, corner of Church and Summer streets and he says he has not got time, for me to look him up and see if I could see this man and I could not see him of course; I looked around and could not see him; that is Detective Turner; that conversation was after the notice I sent in to the paper about him being drowned; I thought that it would probably be a case for the detectives here to look up; I had had no previous acquaintance with Mr. Turner; knew him by sight; had been introduced to him, to several detectives here of course. I belong to several lodges and a good many of them belong to the same ones I do; to the Royal Arcanum and Mr. Turner was a Royal Arcanum man and both of us get acquainted with one another; just as soon as I get the newspaper that I spoke of I spoke to Mr. Turner; just as soon as I got the paper I told my sister-in-law—says I "I am going up to town and take this paper with me" but I did not mention to her that I was going to show it to him.

Q. What was the crime of which you believed Mr. Hunter had been guilty.

A. Well I didn't know but what there might be some crooked work in it; after shaking hands with a man in a store and his name is Wm. Hunter from Homer, Ohio. I didn't know anything about this question being in there; I was as innocent as a child I didn't know anything about that.

Q. But immediately after you got the paper from Ohio you believed that man had been guilty of some crime and considered it your duty to inform the police?

A. Well, if he was in the city of Nashville at that time and I thought probably that if he had committed anything wrong they could look him up; I did not know but what that was my duty; nobody was present when I had this talk with Mr. Turner; he was at his desk, not feeling well and has died recently; I put the notice in the Ohio paper through courtesy to his family because it was a very nice family of people too; their standing in Ohio is very good;

678 I do not know anything of the man Hunter, he had a nice father and mother while I was living there. There was nothing in his family connection that aroused my suspicion; or made me think he had been guilty of something crooked or some crime; that the interest of justice required that I should at once report it to the police; the family stood as highly as any family in that community at that time when I was there.

Q. And you never heard anything contradictory about him; was not he as good as any of his family?

A. I could not tell you anything about it; I know his father and mother well; do not know his father's name; he was a man about very nearly six feet high, a heavy set man when I saw him. You go back fifteen or sixteen years and go back and look at a man and it is hard to describe a man Mr. Marks. I could not tell you what sort of a beard his father wore; he was a farmer; could not tell you what sort of nose he had; could not describe a single characteristic his father had because I was not mixed any with his family; was not with them enough to notice that; do not know that I saw him but two or three times in my travels through the country. When I worked for the Advocate Printing Company I solicited the weekly paper for them; I can only remember that he was a heavy set man nearly six feet tall; think his wife was living when I knew him but would not be certain; I think I seen both of them in my time; could not exactly tell you what sort of a looking lady his wife was; do not remember exactly; I guess she was acquainted with me, everybody knew me in that country; I could not tell you who was in the family besides the father and mother.

Did not know Wm. Hunter then at all, nor any of his brothers.

Q. And cannot state a single fact relating to any of them?

A. No sir, I only knew he gave me his name as Wm. Hunter from Homer, Ohio, and could not say there is any other Wm. Hunter in Ohio. I could not tell you the name of the other Hunters nor any single one of them, nor his father's name; only they lived about 18 or 20 miles from where I did in the same county; Licking county;

679 Homer is in Licking county; I am not acquainted with any other fact connected with the Hunter family their identity or description of any one of them or the names of them; know absolutely nothing about them except that there was a man by the name of Hunter who lived in Homer, and he gave me his name as

William Hunter, and that in the family I knew the old gentleman I knew was a heavy-set and pretty near six feet tall and had a wife and a farm at the time I knew him; am not able to state any other fact or incident in connection with the family; I lived then 18 or 20 miles from where the Hunter family lived about 30 years. I was not a partner but a clerk in the dry goods business at Newark; clerked for my brother; had two brothers in the dry goods business; I had three brothers in the dry goods business there and I clerked for each of them at different times; I never was involved in any litigation growing out of the business; there never was any litigation that I knew of; while at work for the paper, the Advocate, I solicited for it; I was the only Republican on the paper; it was a very strong Democratic paper and I was just the other way and they had me soliciting for the weekly papers through the counties among the Republicans; I think I solicited for this paper six or seven years; I do not quite remember now what year it was I moved to Nashville; moved here for my wife's health; I think in February 1890; my wife died here; I did not work on the paper in the capacity of a reporter; solicited subscribers and also worked on the American and on the weekly and on the daily; that was a Republican paper; I do not know as I had left Newark for good; that is my home; it has been there for years and I got a brother there. Well our family is all scattered; one brother in Newark, one in California, one in Chicago and myself here; I am like the Wandering Jew Mr. Marks, I have no home now; I voted once here in Nashville two or three years ago; I will vote this time; I voted for another Republican candidate for governor except Tillman; in another election I voted here for President; for McKinley. Saw Mr. Hunter in January 1897. I do not know what the election was, two months before I claim to have seen Mr. Hunter, I never pay any attention to these things at all; I
680 only voted twice here for governor and for President; did not at that time have any intention of returning to Newark to live; the only time I have gone back to Newark was when I buried my wife could not tell you when Mr. Flourish changed his business from Cherry street and went to the corner of Church and Summer; he was on that corner when I saw him in January 1897; that is where I saw this man that claimed to be Wm. Hunter; he was in the store when I went in; standing on that side of the house next to the cigar case. I was on the other side; no one was with Hunter or talking to him; I went in and bought some tobacco had only been there a few minutes before any words were passed between Hunter and me; there may have been others in the store but I do not know that there was anybody; I noticed he was a stranger, he looked like it to me; I could not tell you how many people live in Nashville, do not know that the official census of 1890 shows it to have had 76,000 population; could not tell you how many of that number I know; am not acquainted with as many as five hundred; I do not know what there was about the appearance of that man that enabled me to know that he was not a citizen of Nashville; I

just seen that he was a stranger and that is all, and went up and spoke to him; it is natural for us to do that; he said he was a sheriff in Texas but did not tell me what county; I did not recognize him as Wm. Hunter from Homer, Licking county, Ohio at the time that we spoke and did not recognize anything of the Hunter family in his face at all; he was a perfect stranger to me; he left the store first; never saw him after that but tried to shortly after I got that paper, I thought I might meet him on the street again; I did not want to see him for anything particular, just wanted to see him and have a talk with him, that is all; he did not say anything about having any insurance on his life; I do not know anything about it and do not know anything about his affairs; I notified Turner what I saw in the paper, took the paper and showed it to him and he read it; it was two or three days after I saw this paper that I decided to write the letter to the Newark paper, the Advocate Printing Company; I wrote it after I had seen Mr. Turner;

681 from kind motives and nothing else sir.

Q. After you had put the detective on the search for the missing party you suspected of crooked work?

A. I had put him on the search; I thought probably there might be something crooked in it, that is all; I saw Mr. Henry, the agent of the insurance company two or three times; was invited to come to his office. Up in Hopkinsville last month I talked with another agent of the insurance company, just mentioned that about a man trying to beat the company, that is all; I was talking with him; was well acquainted with him; was trying to sell him some books and told him that a man in Texas was trying to get the best of the company; that I had seen the man and shook hands with him; I never talked with any other agent of the insurance company than these two. In my letter to the Advocate I did not write as follows: "The Mr. William Hunter referred to is not dead as I met him and shook hands with him on a street-car in Nashville on January 22. Mr. Hunter's father lives in Homer, Ohio." The clipping from the newspaper was shown the witness and filed as "Exhibit 1" to his deposition and headed "Hunter is alive" and is as follows, to-wit:

"Mr. D. G. Wallace says he met him at Nashville, Tennessee, ten days ago. On January 8th, the Advocate published an article credited to the Utica paper saying that word had been received by Addison Hunter at Homer, this county of the disappearance and probable death of his son William, in Texas. The notice said that young Wm. Hunter had for two weeks been missing from the town in which he lived, his sister became alarmed and notified friends and sent a party in search of him. Mr. Hunter, recently elected sheriff, had left the Texas town on official business but his prolonged absence could not be accounted for.

"After going quite a distance" said the notice, "a company discovered Hunter's wagon containing gun and other belongings; nearby

tied to a tree lay the dead body of one of his horses, starved
682 to death. The other animal was feeding at no great distance.
No trace of Hunter was found and it was supposed that he had gone to a steep bank of the river and while trying to dip water with a bucket and rope fell in, he was swept away.

"Mr. D. G. Wallace, formerly of this city, now living at Nashville, Tenn. read in the Advocate the above quotation from the Utica paper; Mr. Wallace says in a letter just received: 'Mr. William Hunter referred to is not dead as I met him and shook hands with him on a street car in Nashville on January 22. Mr. Hunter's father lives in Homer, Ohio.'"

Witness was asked to say whether or not the above was the notice that appeared in the Advocate after he wrote them that letter he answered "Well that part was not in it at all—where I met him there was not in the paper at all when I got it. I mean, the letter that I wrote them was not in the Advocate; what I wrote the Advocate about meeting this man was not in it then that I saw; I got the paper regularly but that was not in that piece there, that is all there; that was afterwards; it was several days after I wrote the letter before this was published. Witness said "I did not see this party, I saw that party, (The deposition fails to designate the parties referred to)

Q. How did you learn if you never saw this, that the newspaper had published it, that you had seen Hunter in a street-car?

A. They must have seen it in the paper; I wrote them and told them that I had seen a notice in the paper that Wm. Hunter, sheriff of Texas was drowned and that I shook hands with Mr. Wm. Hunter of Homer Ohio, on the corner of Church and Summer streets in a store, and signed my name; those words about meeting him in a street car was not in my letter; I did not shake hands in a street car; I never saw this article until to-day, this clipping or the paper in which this article was published; I saw the paper from home in which it first told about him being found and his horses—there was quite a little piece. It was about Mr.
Wm. Hunter, formerly of Ohio, sheriff of Texas drowned
683 and one of the horses was found frozen to death and the other wandered off; that was the only newspaper notice I seen that was from Newark, afterwards I saw one saying that I had met him on the street cars after his disappearance the substance of that notice was as you have there. "D. G. Wallace, formerly of Newark, now of Nashville, Tenn., shook hands with Wm. Hunter on a street car" and I made the remark to my sister-in-law I says "That is a mistake, I did not see him on a street car, I saw him in a store; that was two or three days after I wrote the letter; could not tell you for certain; witness said he would not recognize the photograph of any member of the family except William Hunter and he first saw that at the police station a couple of months ago with about 15 or 20 photographs, and I picked out that man on the left as Wm. Hunter; he was nearly six feet high, a little stooped

spare built, wore a black hat and black suit; did not notice what kind of rings or shoes he wore; had a black overcoat. First said that — had a black moustache, then that it was dark and he called it black; did not notice the color of his hair, did not see his hair very well as he had his hat on; had a medium chin, do not think it was retreating; he did not have a real black moustache, it was not a light one; could not tell what sort of nose he had nor the color of his eyes.

Witness was shown photograph marked "Exhibit 2" to his deposition and stated that he could not say whether it was a photograph of Wm. Hunter whom he saw in the cigar store in January 1897; he was shown photograph marked "Exhibit 3" and asked if that was a photograph of the man he saw and said "No sir that man is
684 a side-view, the other was a plainer face and I could see better. Witness said that "Exhibit 4" was not a photograph of the man he saw, and the same of Nos. 5, 6, 7, and 8. I am only sure of one of the photographs; none of these you showed me at all are the photographs of the man I saw that day; I do not know whether he is amongst the photographs you have shown me or not. That is the one I saw (referring to the photograph marked "Exhibit A" on direct examination)—I could not see so well about the man at the table with a pen in his hand. Going back to the newspaper notices witness said that he only saw one notice about this matter and that was the notice which said that Wm. Hunter was supposed to be drowned and told about his horses being found that way and that notice led him to write to the Advocate of the fact of his having seen him here in Nashville; on being again asked how he learned that the Ohio paper stated that the witness had seen Mr. Hunter on a street car in Nashville he said: "Well they just read that letter of mine wrong, that is all" I afterwards saw this other in the newspaper, the part that states that I saw him in a street-car in Nashville and shook hands with him and that is the second notice that I spoke of reading just a few days after I had written the letter; there was only one such notice that I saw.

On redirect examination witness said:

I saw one notice in the paper containing an account of Hunter's death and then wrote a note to the Advocate; after that I saw another notice in the paper that I wrote them. In this second notice they have me quoted as saying that I shook hands with Mr. Hunter on a street-car in Nashville; I did not write that, but that I met him in a store on the corner of Church and Summer streets.

685 J. A. FLOERISH witness for defendant being duly sworn testified by deposition taken *de bene esse* as follows:

In January 1897 I was in the cigar and tobacco business at # 430 Church street, corner of Summer, Nashville, Tennessee; was only acquainted with D. G. Wallace as a customer who would be in and

out; I never knew who or what his name was until this business came up; I met him every day like many other customers; he was in my store almost every day when he was in the city; I remember his having a conversation with some man who appeared to be a stranger but do not remember exactly the month; it was sometime in 1897 to the best of my recollection; it was the first part of the year, January or February; I could not say from his appearance whether the man he was talking to looked like a resident of Nashville or a stranger, but from his conversation I judged that he was a stranger; I heard Wallace say something to him about coming from some place in Ohio; I think he said Newark or some such place was, he said the name of the town, but not being interested I did not pay much attention to the conversation; I heard him say that he was from that same point; Wallace came back into my store a day or two after the conversation with this gentleman and asked me if the man had been back.

On cross-examination witness said:

His store was much frequented by citizens of Nashville as well as strangers; that he was in the ticket business too and that the travelling public came there; I have been in my present place of business about three or four years; I did not know this man's name at all; had simply seen him come in there and talk with this man and only paid very little attention to it; of course I could not help noticing some things they said standing there; they both spoke of being from the same place in Ohio, Newark I think was the name of the
686 town; there was some other name this stranger mentioned, it was Coma or Homer; I recall Mr. Wallace spoke of it at the time, I think he said Homer, Ohio; I remembered the name at the time; when Wallace come in the second time inquiring about this man he spoke something about Homer, Ohio. I do not remember hearing the other man say anything about Homer Ohio at the time he was in there but understood that both come from the same place or locality there, I remember that.

R. A. HENRY, witness for defendant being duly sworn testified by deposition taken *de bene esse:*

I am now in the employ of the Fidelity Mutual Life Association of Philadelphia; manager for the Tennessee department. My office is # 30 Homestead building, Nashville, Tenn. Am acquainted with D. G. Wallace; first met him about two months ago; I had a letter from the president of the association requesting me to see Mr. Wallace in regard to this matter; I submitted Mr. Wallace quite a number of photographs and among them is that purported to be that of Mr. Hunter; that was done in the office of the chief of police of the city of Nashville. I had never before that submitted or shown to Mr. Wallace a picture that was a true picture of Mr. Hunter. The picture which had been sent me of Mr. Hunter had been kept in my possession all the time from the time it was sent until I submit-

ted it to Mr. Wallace with the other pictures. The picture marked "Exhibit A" to the deposition of Mr. Wallace is the picture that Mr. Wallace identified as that of the man he saw in Floerisi's cigar store. He specially recognized the front view, the picture on the left.

On cross-examination witness said:

Wallace said that he took the picture of the man sitting at the table with a pen in his hand to be the same as the other view but that the front view was very distinct in resemblance; I do not know whether in fact, that is the picture of the same man taken in different positions; it is my impression that it is. I think Mr.
687 Wallace understood that day that these two pictures were pictures of the same man in different positions but I am not sure about that. I handed Wallace a bunch of pictures and asked him to identify any of them if such they were, as the man he knew; that is the one he selected; I don't know where the other photographs are that I handed him but I think I sent them to the company; there were seven or eight in number; they were single photographs of men; one or two of them I knew personally in the city; they were furnished me by the association; one of them only did I recognize personally as a Nashville man; I do not remember whether it was taken by a Nashville photographer; do not remember if I ever heard of Wallace until I received the letter from President Faust of the association requesting me to find him and ascertain the facts as he knew them.

Defendant offered the deposition of A. H. PIERSON, plaintiff's witness who testified as follows:

Am 40 years of age; business manager of the Newark Advocate and my place of residence is Newark, Ohio; I was in the same business and lived at the same place in 1897; remember the article which is marked "Exhibit A" and headed "Hunter is alive." It appeared in the Newark Advocate; I was in no wise connected with the writing of said letter therein referred to and have no knowledge of it as I can now recollect; the files are in book form and we never allow the files of the paper to leave the office as we only have one copy on file that far back. By a comparison of the files of our paper I find that Exhibit "A" is an exact copy of articles published in the Daily Advocate of January 29th 1897 and headed "Hunter is alive" (which is quoted fully in the deposition of D. G. Wallace) I only remember it by referring to files of the paper; I do not remember to whom the letter from Wallace was written but remember that there was such a letter; I cannot say whether the quotation in said article is a correct quotation from Mr. Wallace's letter. Wallace formerly worked for the Newark Advocate and at that time
688 was a subscriber and I presume it was from his interest in the paper that caused him to write to the Advocate. No agent or representative of the Fidelity Mutual Life Association of

Philadelphia came to Newark and called on any representative of the Advocate and got the Advocate to publish said article "Hunter is alive" that I know of. I do not know that such a squib, stating that W. A. Hunter had $90,000.00 insurance on his life and intimate that while he may have disappeared that it did not follow he was dead, was published, I don't know anything about it; no one of the company's agents called at the time mentioned to my knowledge and no representative to my knowledge called to see the Advocate or any representative of it during the month of January, 1897; it is an impossibility to preserve the letters that we receive and the one referred to as gotten from Wallace was probably thrown into the waste basket; we have no copy other than was quoted in the paper which is the same found in "Exhibit A" attached to interrogatories. No agent of the Fidelity Life Association had anything to do with or procured the publication of any article as a news item or the article which appeared in the Newark Advocate concerning the disappearance of William A. Hunter, Jr., to my knowledge. I had no communication with that company or any agent connected therewith; the first publication we made of the rumored disappearance of W. A. Hunter, Jr., was copied from the Utica Herald. D. G. Wallace of Nashville, Tennessee resided at Newark Ohio for a number of years and was in the employ of the Newark Advocate for several years; I am unable to say for what length of time but for several years. He lived at Newark, Ohio. The first knowledge I had of Hunter's disappearance was from reading it in the Newark Advocate. The only mention made was in the two articles in the Advocate headed "Hunter is alive" "Horses starved to death" so far as I know of. Wallace has been a subscriber for our paper four or five years as nearly as I can recollect; while in Newark he was a dry goods clerk and solicitor
689 for the Newark Advocate and represented said paper six or eight years I should think, both in the country and city. A letter came to the Advocate office from the insurance company; I cannot give the date; it was late in the fall of 1898 or early in 1899; I have no letters in my possession and do not know where they are.

690 Defendant offered in evidence the deposition of C. H. SPENCER, taken by plaintiff on the 2nd day of June 1899:

Am 29 years old, reside at Newark, Ohio, and am associate editor of the Newark Advocate, and was in the same occupation during the year 1897. I remember the publication in said paper of the article, marked Exhibit A, and attached to the interrogatories, and headed "Hunter is alive." I recollect to have written this article and sent it to Mr. Hunter. It was done voluntarily by me and my purpose was to convey some pleasing information to him. It was published in the Daily Advocate, Friday January 29th 1897, and it reads the same as Exhibit A attached to interrogatories (which is the same exhibit heretofore copied in depositions of D. G. Wallace).

I remember the publication of the article in the Advocate on January the 8th, referred to in Exhibit A. The letter from D. G. Wallace referred to in article headed "Hunter is alive" was either to the Advocate Printing Company, or to some individual on the staff; I would say that the quotation from his letter in the article headed "Hunter is alive" was correct.

I made the abstract myself. Mr. Wallace sometime prior to this was employed by the Advocate as a canvasser and solicitor, and I presume, maintaining an interest in the Advocate thought that we would be glad to get the item of news, which his letter contained. No agent or representative of the Fidelity Mutual Life Association of Philadelphia came to Newark and called on me, or any other representative of the Advocate, and got the Advocate to publish the article "Hunter is alive." No one representing said insurance company called to see the Advocate, or any representative of it during the month of January 1897. The Advocate published the article as a mere item of news and with no other purpose. I have no recollection as to what was done with the letter from Wallace, but presume it was thrown in the waste basket. It was not given to
691 the insurance company, as I did not hear anything from it until this last year.

On cross-examination witness said:—No agent of the defendant had anything to do with or procured the publication of any article as a news item or editorial, which appeared in the Newark Advocate, concerning the disappearance of William A. Hunter, Jr. We first received inquiry from the president of the defendant company, inquiring concerning the publication, which had appeared in the Advocate. This was within the past year. I have not his letter or my reply, but the requested papers, containing the articles, I furnished him. The first publication made by us in the Advocate concerning the rumored disappearance of Hunter was copied from another paper called the "Utica Herald," and was credited to said paper. D. G. Wallace of Nashville, Tennessee resided at Newark, Ohio, for a number of years and for several years was in the employ of the Newark Advocate. I know his standing and reputation for truth and veracity in that community. Witness was then asked to state what his standing and reputation for truth and veracity in said community was? To which the plaintiff objected, which objection the court sustained. To which ruling of the court, the defendant then and there excepted and could have proved by said witness that the reputation for truth and veracity of D. G. Wallace, defendant's witness at Nashville, Tennessee, in the vicinity of Newark, Ohio, was good.

Wallace wrote to me voluntarily and referred to having met Hunter on the streetcar at Nashville and having shaken hands with him on January 22nd 1897. He said nothing about a cigar store that I recollect. Am sure that he said that he met him on the street car, basing my statement on the quotation from Wallace's letter as printed in the Daily Advocate of January 29th 1897. I

never heard from the insurance company until long after the articles appeared in the Advocate. They were published in January
692 1897, and I heard from the insurance company as I recollect, late in the year 1898. I first learned of Hunter's disappearance from the article in the Utica Herald, which the Advocate reprinted in its issue of January 8th, 1897. They were bound in the files and cannot be produced, as we have no other copies. Mr. Wallace was employed in some mercantile business at Newark, prior to his connection with the Advocate, he was employed as a collector and solicitor for the book bindery department of the Advocate, but worked principally as a solicitor and collector in the country, also did work in the city.

Defendant then offered to prove by Patrick Carson, Lee Johnson and others the general reputation at Pecos, Texas, and in that vicinity, as to whether or not Hunter was found dead. To which evidence the plaintiff objected and the court having sustained said objection, defendant then and there excepted and could have proved by said witnesses that the general reputation in Pecos and in the vicinity from which Hunter disappeared was that W. A. Hunter is not dead.

Defendant then moved the court to exclude the testimony introduced over its objections by plaintiff, undertaken to establish the death of Hunter by family repute (and herein contained in the testimony of the witnesses, W. A. Hunter, Sr. and members of his family at Homer, Ohio, and that of the plaintiff herein), which motion was by the court overruled and defendant then and there excepted.

Lee Johnson for defendant further testified as follows:—I know that a dam was built across the Pecos river above the Pioneer canal at Edd New Mexico, after it was built, it had the effect to dimini the flow of water in the river below the dam fully one-half. The water is used up in New Mexico in the Pecos and is practically consumed up to where the dam is. The Pecos river is supplied from that dam down to Pecos city by springs. The
693 effect of building the dam and the use of the water upon the stream in the summer time is to make the water very low unless there is a heavy rain. I never could tell much difference except when a rise was on between the flow of water below the dam in winter and summer.

On cross-examination, witness said: They used the water above the dam more or less all during the year. Did not irrigate crops in December. It is ninety miles from Pecos, Texas, to Eddy, New Mexico. They have a large storage reservoir for water up there. We kept a man riding the fences and riding the Pecos river up and down all the time to keep the cattle out of it. We have a frontage in our pasture of thirty miles on the river. Cattle don't bog so bad after the river has been low for two or three months and the banks

settle. The condition of the river in December depends upon the rain-fall. As a rule, don't have any rain down there in September.

H. C. SLACK, witness for the defendant, being sworn, testified as follows:—"Have lived in Pecos country since 1882, working cattle most of the time. Am pretty well acquainted with the Pecos river and its condition. Became so by working along the river with cattle. I am the same Slack that was with the hunting party in search of Mr. Hunter in December 1896. R. S. Johnson first asked me to go. I went up to Mentone; was gone two days; found nothing; a short time after that I went again, about the 1st of December. Joe and Tom White were with me at that time. We found the Hunter outfit and found a great many other people there,—R. S. Johnson, Jim Gibson, Mrs. Johnson, Mrs. Mettler, and a couple of cow boys, Geo. Mansfield, may be, and R. S. Johnson's boy. I don't remem-
694 ber all the articles at the camp. We *we* found a bed, a Winchester gun and some hay, some provisions. Don't remember what was there in the way of implements. Don't remember that I saw an ax or saw. I helped search around the camp. I saw footprints there, leading in the direction of the river. There was a place where a little fire had been built. It was small. You could just tell on the ground there had been a fire. There were some little pieces of wood around it. I know the point on the river, close to the river bank, where it is alleged that the root is broken off and tracks leading up to that point. There were tracks leading in another direction, towards a little peninsular in the river, that looked as though he walked along as many as two or three times. It looked as if there were bucket prints where a bucket had been set down on this peninsular on the bank of the river. This was a little point down in the river. Cannot tell exactly how many foot-prints were down there. There were some two or three. Looked like he had been down and back twice. The tracks went down to about two feet of water. They were tolerably plain. The water in the river below the last foot-print, or bucket mark on the peninsular, I think was about two feet."

Here the court adjourned until tomorrow morning at 10 o'clock.

Friday, June 1, 1900, at 10 o'clock a. m., H. C. SLACK further testified:

"I remember the discovery of the other foot-prints. There was a mesquite limb discovered near the bank of the river, that had been broken off. The foot-prints at that point were about 10 or 12 inches from the bank of the river and pointed mostly up the river. This root or limb was not broken off smooth but had splintered back" (Witness places his feet on a paper showing the position of the foot-prints with reference to the bank of the river and the location of the root and position of the feet when it

is supposed the root was broken. The root was 10 or 12
695 inches from the bank. Witness then indicated by placing a pencil on the paper, showing how the root was lying.) "My recollection is that this point was nearly perpendicular. It was not entirely so. From the bottom of the bank to the water edge, I think there was something like a foot and a half, and a little sand-bar, that is, the water came up to within a foot and a half of the bottom of the bank at that point. I saw no indentation on the sand there, of any character. The sand was smooth. I crossed the river on that day, going to and from the outfit, about 8 miles above town, on horseback. The waters were up about to my stirrup on a small horse. The horse is about 14 and a half hands high. I did not have to take my feet out of the stirrup. This crossing was about three or four miles below where the outfit was found. Joe and Tom White crossed the river with me that day. There were part of the searching party. We all crossed the river on horse back. I think I was there again, sometime in January following, about the 20th. Mr. Milliken, Mr. Gibson and Mr. R. S. Johnson were with me. Then we made some measurements. On that day the water was higher than at *at* the time of my former visit to the camp. The water was above the peninsular on the 20th of January. I think it was 8 or 10 inches above the last foot-print on the peninsular we discovered when the camp was first found, and the water was up close to the bank underneath where the root was broken on January 20th. I waded into the stream on that day. Think I went in from that peninsular and waded up the stream out into it quite a little ways. I waded up the river some 20 feet and waded up opposite the broken root. (indicating his movements by reference to the map offered in evidence) Just after the peninsular the water was about 2½ feet deep and was of the same depth opposite the root, about 6 or 7 feet into the river. I — from there out towards the center of
696 the current, went out to the middle of the current. The bed of the stream is a gradual descent from the bank out into the river. In the center of the current it was over my head. I am 5 feet 7½ inches high. It was a gravel bottom, hard firm gravel. Towards the edge of the bank it was mud. My feet sunk in the mud just down over my ankles. I didn't stand still but was moving nearly all the time I was in there. The water was very cold. They insisted on putting a rope around me when I went in. They were afraid I might take cramps, going into the water, but I had nothing indicating the cramps. I have been along the river since 1882. The volume of water that flows down the Pecos has been decreased in the last 8 or 9 years down about Pecos. Don't think it run more than half it did before the dams were put in. The dams I refer to are located about 8 miles above the town of Pecos and one at Eddy, 85 or 90 miles. There are some pictures taken where the camp outfit was found in May of 1898. I was there. (Witness recognizes his picture, holding the horse out in the river, and identifies Mr. Estes and Mr. Randolph in the same picture.) I was in

the center of the current when it was taken and had a couple of horses. There was no quicksand down there then. It was a hard firm bottom. These horses were about 15 hands high. The water was 2½ feet deep where they were standing. I was holding the horses at a point opposite where the broken root or limb was found, and was in that place when the pictures were taken. (Identifies the picture which shows him holding the horses in the stream. Witness identifies the picture he appears in as one taken in front of the peninsular.) The one with one horse was taken right opposite the root. The other people in the same picture were Estes and Randolph. (Said pictures were then offered in evidence, marked "C" and "D.")

697 The surface of the ground on the bank where the root was broken off had tufts of grass along the bank. It was what is called salt grass, and was scattered around over the ground. A party could walk on these tufts of grass and not make any foot prints at all. I did it myself. I started from where this root was broken and walked off quite a little distance and could have gone three miles, if I had wanted to on the tufts of grass without making any tracks. I did not see any valise of any character among the articles found at the camp, don't remember seeing a hatchet nor a saw. Don't remember the articles that were in the wagon.

On cross-examination, witness testified:—I was in Pecos in December 1896. Am the same Slack that rode up to Mentone in Loving county to see what had become of Mr. Hunter. I went to Mentone on the east side of the river—crossed the Pecos on the bridge and turned up on the east side. I trailed one wagon and horse right up close to Mentone. Could not tell how many horses were in the wagon. Supposed to be two. Two was all I could see. Tracked them pretty close to Mentone. Did not strike any trail for the first ten or twelve miles; saw horse tracks all along up and down the road for some six miles, and wagon tracks the first eight miles. The Hunter camp was several miles above the dam. I never saw any wagon tracks or horse tracks on the road north of this point until I got within about eight miles of Mentone. I found some wagon tracks coming out from towards the river and traveled up the road a few miles and had camped and I could not trail them away from there. It was very dim. The camp I found was where a fire had been built and some sorghum fed and parties ate. This was not the camp where we found the Hunter outfit. On the 29th of December, I went with a party up to the Hunter camp. Saw where a wagon drove along the slough. Did not see where it

698 turned off the road. The first wagon tracks that I could see were 150 or 200 yards from the road. Saw no wagon or horse tracks in the road. I first met Milliken in January 1897. Give Milliken a written statement, signed and sworn to by me. I made no changes in the statement, but read it over. Mr. Gibson and I did not examine any horse tracks on the

road. We did at the wagon. There were several tracks there. Don't remember about a big track. They were just common horse tracks. I have been up to the Hunter outfit five or six times; first went by myself; second time in January 1897, but I had gone with the White brothers December 29th 1896, that was when R. S. Johnson and wife, Mrs. Mettler, Gibson and others were there. The third time was about the 20th of January 1897, with Milliken, Johnson and Gibson, and this was when I went in the river. Milliken dug the bank with a spade on that day. Took some measurements. The fourth trip was about a year after that in January 1898 or perhaps in May or June. Witness was handed the picture having the two horses in it marked "C" and said it was taken in May 1899. There are changes in the Pecos river every year and every rise. At my trip to the camp in December 1896, the water in the river at that place where the root was broken was about a foot and a half out from the bottom of the bank. On January 20th 1897, there was barely room for a man to stand on this bank at the bottom, between the water and the bank. A map showing the water 8 7/10 feet from the bottom would not show it correctly at the time I was there in December 1896 and January 1897. It would show it correctly in May 1899. This perpendicular bank was about as high as my head in December 1896 and January 1897; that is if I were standing on this eighteen inches of sand at the bottom of the bank. In May 1899, the water was lower, the bank about the same height, but was not in the same condition as when I first saw it in December 1897 and January 1897. Between January 1897 and May 1899, there had been no particular change in the bank only we had shoveled the bank off with a shovel. In May 1899, the water was about eight and a half feet from the bottom of the bank. I do not remember Milliken making any trip
699 to the camp without my being with him. The pictures marked B 1, were pictures taken on the same day as the one with the two horses. If a man fell in the river, the chances are that he would have to go down the river a little before he could get out, the distance depended altogether on how he handled himself. If he fell in and could not swim, I think he would go right to the bottom. When I waded in the river I did not stand still. Might have stopped for a second. If I had stopped in that mud, don't think I would have sunk in it. Kept moving because it was so cold. I never did have cramp in the river. There might have been danger.

On redirect examination, witness said:—The fire at the camp showed signs of some burnt sticks, the ends of which were not burnt up. They were of different sizes; the largest something like as large as my wrist. Compared with the root broken off on the bank of the river, as to appearance and quality of wood, we pronounced this largest stick to be the same. It was the size of the end that was broken down in the ground. The limb was larger. It

was mesquite wood and the broken limb was the same kind as the root or limb in the ground that was dug up, and its appearance corresponded with the largest size stick found at the fire. The spading of which I have spoken was done to get the root out of the ground, and to throw the dirt down I believe. The dirt was dug from the top of the bank and thrown down on a little sandbar to enable one to stand there. Witness indicated on the map that the spading was done at the point where the root or limb was broken.

On recross-examination, witness said:—The dirt at the bottom of the bank was soft and we shoveled some from the top to stand on—not so very much. It was a limb and not a root that we found broken off. All that country is full of mesquite timber. There are a great many other limbs around there of that character and same size up and down the river.

700 I suppose all these limbs around there on the bank would have sediment on them. The end that had splinters on it was the end that was in the fire. The end away from the bank was the way the root pointed. It was broken right in two. Witness indicated with a pencil that the end of the broken limb pointed from the river, and said it was only about eight inches to the edge of the bank, that they dug up a small chunk and put it in the bottom of the buggy. All the search that was made, on the 29th of December 1896, in the river, was to tie a rope to a rake and throw it in the river and draw it back a time or two, and we searched around in the mesquite and went to the dam about four and one-half miles. I have waded in the river lots and lots times and lots of places bog down to your knees, and some places to your ankles, and other places during and after a rise, you bog down deeper. The last time I was there at the point where the broken limb was dug up, I rode a horse into the river about the middle of the current. Think it was rising. Crossed the river above that point on a horse, which horse was about fifteen hands high and the water came up about half way his sides, or not quite so far. The horse did not bog in the place that I rode in opposite the root or limb. Had no difficulty in getting out. The consistency of the mud in the bottom, opposite the mesquite limb, was light mud, just like our soil is, sandy mud soil.

A. J. Brown, witness for defendant, being sworn testified:—I am State agent of the defendant company. As to the circumstances leading up to the making of application for insurance by Hunter, Mr. Hunter came in my office, and during the conversation that followed, said that he had thought of taking out insurance, that he and his brother in-law had gotten into an irrigation scheme and had bought a good deal of Pecos Valley land and owed a good deal of money on the land, and his brother-in-law had

701 afterwards died, and he thought, if he should happen to die, his sister would lose what they had paid. For this reason

he thought of taking some insurance so that she could pay the land out in the event of his death. The application was made in my office at Dallas, and the premiums paid there, and the policies delivered there to Hunter. I have been State agent of defendant since October 1889. I knew William Hunter at Alvarado, Texas, about 1888, since when I have not seen much of him. I forwarded Hunter's application to the home office of defendant at Philadelphia, Pennsylvania, where the policies were issued, and they were then forwarded to me. Hunter stated that he was in the real estate business and farming. I had a talk with him about irrigation matters. I understood it was in connection with his farming. While at Alvarado, he was keeping books. Defendant company does business in about forty States, and have general offices in each of the States, and sub-agents as far as they can. I think I have about forty on my list in this State. The company writes some fifteen or twenty million of insurance in a year. They have about seventy-seven millions in force in the United States. I knew Mr. Hunter well but not intimately. At the time he was in Alvarado, I was away from home. I thought Hunter was a man of good character or I would not have written him. The policies taken by him were the cheapest the company issued at that time. They were what is called "Ten year term policies." If he had died within ten years the policies were good for their face, if the premiums were kept paid. He paid semi-annual premiums of the $15,000.00. It was $97.65. An ordinary life policy for the same amount would have been about double that. Mr. R. C. Milliken is an inspector for the company. An inspector is one who goes through the country and looks after the risks that have been written and sees that the business is being done in a clean legitimate way. Mr. Millekin's headquarters are at Atlanta, Georgia, I understand. He comes to Texas. I think Millikin's business is
702 mainly to detect any fraud and to get up evidence, I presume, in cases. I presume he makes search for missing parties, but don't know. The company has a right, I think, to write any agent they have about anything they want to know. If they want information in Texas, they write to me and I write to my agents. This company does not maintain any lodges or assessments. Do a regular life insurance business. Been in the business about twenty-five years. Organized under the laws of Pennsylvania, I think. Has a permit to do business in Texas. I never saw the charter. It has no organization in Texas doing business through lodges and councils.

On re-direct examination, witness said:—Hunter told me he wanted something cheap. I explained to him the different kinds and rates of the policies. In the event of loss by death among the members of the company, if there were not funds enough on hand to pay the loss, they had a means of providing funds. At the time these policies were issued, they were limited as to what was known as the assessment law, and it collected a regular premium, but in

the policy there was a clause that provided for an assessment, if it should become necessary. They have since changed their method of doing business, but when these policies were issued, they had a right to levy an assessment under conditions. All correspondence relative to this business was done through my office. I did not advise my agents of these circumstances concerning the disappearance of Hunter. I don't remember ever communicating with them except in conversation with them in my office or out in the field. I presume I have mentioned it to a good many of them. I don't think I ever inquired about Hunter, or told my agents to look out for him. I told some — them that he had disappeared. Did not communicate with them systematically or take the matter up and notify them by mail. Whatever was done just came up in the course of conversation. Don't know what the home office did.

703 To illustrate what I mean by the rate on insurance under the assessment clause, say we take a man at the age of forty, the ordinary life policy in an old line company would cost $32.20 per thousand. Ours would be $21.89. The old line premiums embrace an overcharge, which would be returned in dividends, if not needed. Instead of taking the overcharge and returning it in dividends, defendant left it in the members' pockets, but claimed the right to call for it, if an emergency arose. The rate per thousand at the age of forty, on the kind of policy Hunter got was $15.60. In the event the association needed more than had been collected, the company was required to collect only so much excess as was necessary to put it in a good solvent shape.

Defendant propounded the following cross-interrogatories to W. A. HUNTER, SR., whose deposition was taken by plaintiff:

"Are you solvent? What are you worth over and above exemptions? Have you agreed or refused, or are you willing to become surety on the bond for cost in this case in behalf of plaintiff?" To which plaintiff then and there objected because it was immaterial which objection was then and there sustained. To which ruling by the court, defendant then and there excepted and offered and could have proved by the answer of the witness to said interrogatory that he was solvent and worth $3,000.00, above exemptions, and was not willing to become surety on the cost bond of plaintiff.

The witness, W. A. HUNTER, SR., testified in answer to cross-interrogatories, propounded by defendant, that he never offered any reward, or took any steps to find W. A. Hunter, Jr., either dead or alive, after he heard of his disappearance; that he made no inquiry concerning the said W. A. Hunter, Jr., save through his daughter, Mrs. Mettler; that he did not have the Pecos river seined and made no search either of the river or elsewhere, or any effort to find him or his body. Newark, Licking county, Ohio, is sixteen miles from witness' home. When witness saw the article published in

704 the Newark Advocate about the disappearance of W. A. Hunter, Jr., he did not go there to see the editor of said paper

The town is not connected by rail with witness's residence. The same facts as to failure to offer reward or to make any search or inquiry for W. A. Hunter, Jr., were elicited by cross-interrogatories from Charles E. Hunter, brother of the plaintiff and W. A. Hunter, Jr.

R. S. JOHNSON further testified as follows:—I am county treasurer of Reeves county, Texas and have been since 1898, and am a candidate for re-election. Knew Mr. Hunter and Mrs. Mettler at Pecos. Knew the Powers horse for a number of years. I think I knew him before Powers owned him. Saw the body of the horse after he had died, about a mile and a half south from the depot and south of the Texas and Pacific railroad at Barstow. Barstow is almost due east from Pecos on the Texas and Pacific railroad. By the schedule on that road, according to my recollection, on December 3rd 1896, trains coming from El Paso to Fort Worth and Dallas, which are going east, arrive at Pecos at 11.20 p. m. and at 2 o'clock going west. Barstow is six or seven miles and the trains run about twenty-five miles an hour. I was one of the parties who went in search of Hunter on December 29th 1896. Went with Mrs. Mettler and my wife and little boy. Mr. Gibson and others also went. When we got to the camp we found the harness lying in front of the wagon tongue. On the right of the wagon were two buckets and on the left a bed made down and a gun was sitting between the wheels of the wagon where the bed was; that is all the articles on the ground. There were two full bales and a broken bale of hay in the wagon and a stove, three joints of stove pipe and a large tin can—a fifty pound lard can—a small box about 14 x 20 inches containing canned fruit and some knives and forks, two tin plates and I think a cup or two.

705 I don't remember seeing a hatchet, saw or valise. Examined every thing that was in the wagon. I remember the place where the limb was broken off. It was from sixteen to twenty inches from the bank, about eighteen or twenty inches from the toes of footprints. I remember the location of the footprints and of the broken limb with reference to the configuration of the bank. (Witness designates on paper by taking position with reference to the paper representing the bank of the river.) The end of the broken limb pointed toward the bank. The limb or root was broken and splintered off from the upper side. It was pulled up and sprung back and made indentations in the bank. Slack, Milliken and I were there when it was dug up. This imbed-ed piece was from fifteen to eighteen inches long. I think we dug it part of the way and pulled the balance out. I saw the ashes at the camp fire. I don't think there was much over a quart of ashes. There were twenty or thirty unburnt sticks about as thick as my finger and other larger pieces. We found a piece that conformed in size to the root we found imbedded in the ground. It was about the same size and kind of wood, both being mesquite. Have had considerable experience in handling mesquite wood. Lived on a ranch about fifteen

years and used no other kind. The piece we found at the fire looked like it have been lying on the ground, and the piece found at the fire and that dug up at the bank of the river looked just exactly alike. The surface of the ground around had salt grass growing all over the whole valley. Tufts of grass were within fifteen or twenty inches of this root all around. A man could walk away from these footprints at the root of the tufts of grass without making any indentation in the same. I saw it done by Mr. Slack.

On cross-examination, witness said: The Powers horse looked to be eight to twelve years old. I saw this dead horse on January 20th, 1897. He was a big bald horse with three or four white feet and had a bald face. [illegible] in a good state of *perseverance* when I
706 saw him. At the time of this occurrence Powers lived at Pecos, Texas. I am in the saloon business at Pecos and have been since 1890. Have rooms over my saloon. Mr. Milliken left the hotel and took a room with me that he could get one so that he could have a fire in it. I have attended this court every term since this suit was filed. Think I went to the river three times with Milliken. It was a limb and not a root that we dug out of the ground on the bank of the river, and the piece we found at the fire was not a root. The pieces at the fire, except one, were little twigs. Of course, I could not tell where they were gotten. The piece found at the fire which compared in size with that dug up on the bank of the river was about twelve or fourteen inches long. It was not rotten but sound. It took a pretty good pull to get the piece out of the bank. The grass there is called salt grass. Where there is a good deal of alkali, there is less grass. Saw a black sack coat with other things at the camp. I think he stood well in the community. I probably went on his bond when he was elected sheriff, but don't know. Did not, unless he was elected at the first organization of the county. The soil between these t[illegible]f grass mentioned is loose, reddish soil. A man walking on [illegible]oil would make plain tracks. I think the river was about five o[illegible] five and a half feet from the bottom of the bank, when we got there December 29th 1896. It was not right up to the bank. I was there on January 20th 1897. The water was higher and pretty deep in the river, six feet and a half inch. We measured it by Slack going in and going down over his head. The bank sloped a little toward the river at the place where the root was right down on the edge. The track showed that the left foot had slipped. The inside of the left foot had left the deepest impression on the soil. We don't have as many blizzards as we used to have. Have east winds, but seldom have "northers." We used to have sand storms, but have not had any severe ones for five or six years, but have had some pretty high
707 winds. The last time I was here, I saw one about as bad as we ever have. The town of Pecos is a little less than a mile and a half from the river. Last Monday a week ago, Mr. Randolph, Mr. Slack and myself made some measurements as to the velocity of the current, near where this accident is supposed to have occurred.

We went above that point where the river makes a straight shoot, about 120 or 125 yards straight up the river—it is almost straight—and for 200 yards below where the limb was dug up. We went up the river about 125 yards and set three stakes and a line across the river and measured down one-sixteenth of a mile and set three stakes there and then came back about where we first went *went* and threw a chunck in. I think the chunck had been an old railroad tie. It was pine and pretty heavy, about fourteen or fifteen inches long and two and one-half to three inches square. We threw it in the channel. We calculated it would take sixty-four minutes to run two miles. The wind was a little northeast to blow it down the river. There was no obstruction in the river to hinder the flow. I never heard of any measurement of the speed of a river by throwing a chunck in before. Don't know whether a feather would float off and leave the chunck in the same stream or not. Never saw two pieces put in the river and one float off and leave the other. I don't consider the Pecos a swift river. It runs at a very good rate. At the same time we made these measurements by throwing a chunck in the river, the horses were ridden across there. The water struck the horses a little above midway of their sides. Mr. Randolph was there and is the man who took the measurements.

H. B. McDONALD, witness for the defendant, being duly sworn testified :—Am bookkeeper for the City national bank in Dallas and have been for six or seven years. The books show that W. A. Hunter had a deposit in that bank in 1896. It was withdrawn November 7th 1896. He drew out $163.31, which balanced his account. Cannot say how long that balance had been with
708 us. I traced it back to 1894. The last check prior to November 7th 1896, was October 31st, 1896, for $97.65. As far back as this book goes June 1895, there were no other checks drawn on this account.

JOHN B. LITTLER, witness for defendant, being duly sworn, testified as follows: I live at Big Springs and am county judge of Howard county, Texas, serving my second term. Have lived out there nine years. Am from Ohio. Remember the circumstance that sometime in June 1897 my wife and I returned from a visit east. We left Ohio on the morning of the 8th of June 1897, reached Terre Haute, Indiana about one o'clock that day and stayed there until one o'clock on the day of the 10th, when we left and reached St. Louis the night of the 10th. Left there on the same night for home. Remember meeting a gentleman on the sleeper on the Iron Mountain road, at or near Little Rock, in which some conversation arose as to whether the party was a sheriff in Texas or not. When the train reached Little Rock on the morning of the 11th, my wife and I got off to get breakfast. After breakfast I got back on the Pullman and went in the smoking compartment. There were two other gentlemen in there, is my recollection, sitting in the smoking compartment.

After a few minutes we engaged in conversation, and I made some remark that lead them to believe that I was from West Texas. Immediately after making this remark, this other gentleman remarked "This gentleman was sheriff of Loving county," and I repeated "Loving county?" and he said "Yes." I then tried to engage the party who was pointed out to me as the sheriff of Loving county, and in substance remarked that Loving county was in a bad tangle financially, and he said "Yes." I might have asked him one or two other questions and he answered me in monosyl-ables. It was entirely in regard to the financial condition of Loving county. I made a remark as to the county's bad tangle financially, and almost immediately after this remark was made, that this gentleman was a sheriff of Loving county, he got up and left the smoking compartment of the sleeper. I remained there until I got
709 through smoking and then went out to find him and have a talk with him. I was interested in the financial condition of Loving county. I held a piece of scrip and this was the first officer I had seen from that county, and I was interested in knowing something of its financial condition and went to hunt him and talk about said condition. In the meantime the train had, perhaps, made one or two stops, and I failed to find the gentleman. My recollection is that I went through the sleeper and the car next to the sleeper and never saw this man any more. He was a man a little taller than I, but not so heavy. I guess he would weigh 165 or 170 pounds. Did not stand as straight as I do. He had no moustache. I could recognize his photograph. I did shortly afterwards. Witness was handed a number of photographs and asked to select and point out the one of the man who was in the sleeper. Witness selected the photograph admitted to be that of the said W. A. Hunter.

On cross-examination, witness testified:—The man I saw was dressed in dark clothes, cutaway coat, black hat—I think stiff. My recollection is he had on a standing collar. I never saw either of the gentlemen I saw on the sleeper before. I never made a statement that I went in the smoker and two strangers were in there and that a short time after one of the strangers got up and left the car, and that I and the other got in conversation after the one had left. Never made the statement that the stranger told me that the man who left stated he was a sheriff of Loving county, or had been. I knew Mr. Alexander a lawyer of Dallas. I remember the day I was in his office on Commerce street. I did not state in conversation with him that I went in the smoker and that there were two strangers there and that one of them got up and went out, and that I engaged in conversation with the one that remained and that he told me that the gentleman who had just left stated that he was the sheriff of Loving county, and that after I got up and went to hunt for him and could not find him. Never in substance? The substance is substantially as I have stated here. The only

difference is he told me that before he left the smoker.
710 My statement is that before this stranger left the smoker, he was pointed out to me. He did not leave the smoker before he was pointed out. About the only difference between my statement here and your question is that the party made the remark to me "This is the sheriff of Loving county" before the supposed sheriff left the smoking compartment. It is not true that I told Mr. Alexander that I did not have any conversation at all with this supposed sheriff of Loving county. The stranger did not tell me the name of the supposed sheriff. There was no introduction. I did not know his name, nor he mine. I expect I told Mr. Alexander in the conversation referred to that in about six months after that I was shown a picture but I would not swear that it was the man supposed to be the sheriff. I won't swear now that it was Hunter. I do not know that it was Hunter. Never saw Hunter in my life, unless that was him on the sleeper. I did not tell Mr. Alexander that I could not swear that the picture that was shown me six months after this trip was the photograph of the man I saw in the sleeping car. I first saw Mr. Alexander in Abilene, Texas. He was the attorney of the Texas and Pacific Railroad Company and I was a witness in the case. It was the case of Nunn against the railroad. Mr. Parker, the court stenographer, I think took down the testimony in that case. I testified twice in that case, but did not change my testimony. Mr. Parker reported the case both times. The last time I was on the stand I was asked questions that I was not asked before. My statement varied from this cause. I think the man, whom I saw on the sleeper, had sorter brown eyes and fair complexion. My recollection is that I did not see him with his hat off. I think Mr. Milliken showed me the picture some time in December 1897. The trip I speak of was in June 1897. Did not know in June 1897 that Hunter was missing. I had only been at home a few days from off this trip. It was probably the first of July, when Mr. Estes from Pecos county came to Big Springs to examine some records there. He is the first man I ever talked to about it.
711 I have since talked to Mr. Milliken. Estes came to Big Springs to examine the records regarding Loving County lands. A man who has a moustache like that picture looks quite different when he is smooth shaved. This double picture was shown to me and I identified it. I saw him with his hat on and his moustache shaved off—only had a few words with him. He was smoking. Don't think he was in the smoker five minutes after I went in. The other man in the smoker had a dark moustache. He was not as large a man as the supposed Hunter and tolerably fair complexion and wore a soft hat, and my recollection is he had on dark clothes—what is called a frock coat—and don't remember his shoes, nor the kind of shoes Hunter had on. I remember distinctly another man came in there. Was the train master of the Iron Mountain road and traveled with us to Texarkana where he got off. Think he was smooth shaven and sandy complexion. Cannot describe his clothes,

Think he had a sack coat on. I got on the sleeper at St. Louis. As a rule there are a good many people coming south on the night sleeper.

On redirect examination, witness said:—Mr. Estes came to Big Springs about the first of July and I helped him look up the records regarding Loving County school lands, and in a discussion he mentioned the sheriff. In December following I saw Mr. Milliken. When I was handed the picture I put my hand over the moustache and made the remark That is the picture of the man I saw on the sleeper.

On recross-examination, witness says:—I tell the jury I placed my hand over the moustache in the picture and recognized it. His hat did not go down over his eyes, but it was just on top of his head. There was nothing peculiar about his hat that attracted my attention. Did not notice his eyes particularly—nothing peculiar about them to attract my attention, nor his nose. The picture looked familiar when handed to me with the moustache, but I would not be positive until I placed my hand over it. He wore a derby hat.

Here defendant rested.

712 Mrs. METTLER recalled and identified the photograph of her father and said it had been taken five or six years. He was born in 1828. Has worn a beard like that ever since I can remember. The photograph was offered in evidence. My brother W. A. Hunter came to Pecos where I was living, reaching there about two o'clock Monday morning, stopped at the Commercial hotel, which was kept by Mr. Miller. Came to see me in the forenoon and a little while in the afternoon and ate supper with us and spent the evening and went back to the hotel. I saw him again next morning and again in the afternoon. I was then boarding with Mrs. Hardeman. The next day we went out and got the Powers horse and the wagon I had left out there at Mr. Powers' house. The Powers horse was an ordinary common brown horse. It was a great deal larger than my little pony. My brother got some things at the store and came back and got his grip and brought it to the house and turned it over to me. It was a telescope grip. I never saw him have any small leather grip with a strap on it. When he left my house he did not go by the hotel; that would have been out of his way. Witness identifies a picture, taken when he was attending Eastman college. I think it was taken about 1884. Don't remember to have ever seen him without a moustache. My brother had no insurance on his life in September 1896.

J. B. GIBSON recalled by plaintiff testified as follows:—Gibson was handed a sketch of the town of Pecos. Witness points out to the jury the location of the different points, showing the direction where Hunter would have to go. From where Mrs. Mettler lived, he would not have to pass the hotel. Witness said he knew Mr. Randolph, county surveyor and had a conversation with him a week or so ago about the survey of the river. Witness was asked to state what the conversation was. To which defendant then and there objected because it was immaterial, which objection was by the court overruled and defendant then and there excepted to said ruling, and the witness testified; I asked Randolph if he made a survey of the river from the dam,
713 about where the wagon was on a straight line, and he said he did. I asked him What the distance? I think he said it was a little over four miles. I then asked him if he surveyed the meanderings of the river? and he said he did, and that the distance was just a mile further. I asked him if he followed the river right around all those bends? and he said he did, and I said I know that river is more than that. I know it is more than five miles and I will have it surveyed and turned around to my desk to make a memorandum, and said, "Did you say four miles on a straight line?" and he said "Yes," and he said "It is only five miles and something with the meanderings." "Well," he said, "you can say anywhere from ten to twelve miles." I introduced Mr. Milliken to Capt. Irvin. They had a conversation in my presence. Mr Milliken wanted to know the dates when the Captain first saw the Powers horse. I think Capt. Irvin said, as near as I can remember, it was about the tenth or fifteenth of December. Don't think Milliken mentioned anything about the date in my hearing. I saw a rope supposed to have come off that horse. The rope was twelve or fifteen feet long, and was about an inch rope and appeared to be old and about half worn out. Near one end was a knot like it had been tied around the horse's neck. There was a little evidence of its having been dragged, but I cannot tell whether it had or not.

The court adjourned.

Saturday morning, June 2nd 1900, the court convened. It was admitted that there was but one payment of the premium and that there had never been a tender back of the premium paid.

W. M. ALEXANDER, witness for the plaintiff, being sworn testified as follows:—I reside in Dallas and have since 1883. Since 1884 I have been practicing law. Am acquainted with John B. Littler of Big Springs slightly. First met him in Abilene in 1896 and possibly in 1897, I was there to try a railroad case for the Texas & Pacific road.
714 My recollection is that Judge Littler was here in attendance upon this case, that had been set for trial as a witness. I called at his hotel and got him to come to our office in Dallas. I

asked him what he knew about the case and he said that the previous summer at Little Rock, Arkansas, he was a passenger going west; that he was in the Pullman car and that a stranger stopped at Little Rock, and he had been out at lunch or something and came back and entered the smoking compartment of the sleeper and that there were two gentlemen in there when he entered, and as he entered one of them got up and went out and that he engaged the other gentleman in conversation, and it was discussed that he (Littler) was from Texas and this gentleman who remained in the smoker said that the gentleman who had just left is from Texas, and is an ex-sheriff of Loving county. This gentleman remained in the smoker. This gentleman remained in the smoker and he said that he would hunt up this former Texas, and he walked out through the car, but did not find him. I asked him, if he was acquainted with this ex-sheriff and — said "No" that he had never had any personal acquaintance with him. I said Well, was that the man you saw go out of there, and he says I will tell you some time. After that he was talking to Mr. Somebody, county attorney (I don't remember the county attorney's name), but he was talking to him about his disappearance in Loving county and he sayd "Why, I saw that party at Little Rock" and this county attorney had a picture and showed it to him and he said I think that is the man, and I asked him if he could identify him after the lapse of time—some time had elapsed—and I asked if he could swear it was the party and he said "I may be mistaken," but am reasonably certain that was the party I saw. I am positive that Judge Littler stated that the stranger in the smoker told him that the gentleman who had just left was an ex-sheriff of Loving county. I am positive he said that was when the train was stopped at Little Rock, he said he believed that was the man. I know I was impressed with the idea of the force of his testimony if he could positively swear
715 to the identity. I cannot tell just what his remark was. He said he thought or believed it was the man. He did not say anything about having talked with the man who left the sleeper in monosyl-ables, or that he made answer in monosyl-ables. My recollection is that he said this ex-sheriff of Loving county was smooth shaved. I have no interest in the recovery of this suit.

On cross-examination, witness said:—This case was taken upon a contingent fee. I have dissolved my partnership with one of the counsel, Mr. Clark now conducting it, by mutual consent. We had quite a volume of business on hand and this case came to my firm through the former acquaintance of Mr. Clark with Mr. Gage, and in the disposition of the business, we made an equitable distribution. I took part and Mr. Clark part. Think the previous terms, the attorneys have advanced the expenses of the witness, Mr. Gibson, I mean the firm of which I was a member, Alexander, Clark & Hall.

716 The above and foregoing was all the evidence introduced on the trial of this cause, and thereupon, and upon the conclusion thereof, before the jury retired, defendant asked the court to give the following instructions, (omitting caption and signature) to the jury, to-wit: "You are instructed to find for defendant," which instruction the court refused to give, to which action by the court, the defendant then and there duly excepted.

Upon the conclusion of the evidence, the court, among other things, charged the jury in writing as follows:

"If you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with 6 % interest thereon from December 2nd, 1897, which is the date on which this suit was instituted in the State court, down to this date, June 2nd, 1900; and also 12 per cent. on the total face of the policies and interest as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss stating each item separate" to which instruction by the court the defendant then and there excepted. And defendant then and there requested the court to give the following instructions to the jury, to-wit:

"Plaintiff is not entitled to recover attorneys' fees or penalty, even if you should, under other instructions given, find that plaintiff is entitled to recover on the policies," which instruction the court then and there refused to give, to which action by the court the defendant then and there duly excepted.

The court in his general charge to the jury also gave the following instruction:

"While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during
717 which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead," to the giving of which instruction the defendant then and there duly excepted, and requested the court to instruct the jury as follows:

"The law presumes that the life of any person continues for seven years after the last time he was seen alive or heard from.

The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts, from which the death of the party is to be inferred, must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue; and all the facts proved must be consistent with each other and consistent with the main facts in issue, that is

the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by a certainty hereinbefore set forth, the jury should find for the defendant," which instruction the court refused to give, to which action by the court defendant then and there duly excepted.

The court further instructed the jury as follows:

"If from the evidence in this case you should come to the conclusion that Hunter had been continuously absent since December 3rd, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict."

718 "Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence." To which instructions the defendant then and there duly excepted.

The court further charged the jury: "Reputation in his (insured's) family on the part of his father, sisters and brothers of his death, is proper evidence for your consideration, but not the opinion of any one," to which instructions the defendant then and there duly excepted.

Defendant also asked the court to charge the jury as follows: "If you believe from the evidence that Wm. A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant," which instructions the court refused, because the substance thereof was included in the main charge by the court as follows: "The evidence of witnesses is also before you tending to show that Wm. A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896, you should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance and if you believe from the evidence that he was seen by the witnesses who have testified to this, then of course it would be your duty to find for the defendant," to which action by the court defendant then and there duly excepted.

Defendant also duly requested the court to give the following instruction:

"The fact that it was possible or probable that the absent party was, at a time and place subsequent to and different from

719 that at which he was last seen, in a place where an accident might have befallen him, will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death. Therefore, unless the jury believe from the evidence that W. A. Hunter, Jr., when last seen was in a position of peril such as that it is more probable that he then and there lost his life, than that he ex-

tricated himself from such perilous position alive, you must find for the defendant," which the court refused, to which refusal the defendant then and there duly excepted.

Defendant also requested the court to give the following instruction:

"A warranty is a stipulation in writing in the policy, or a condition thereon endorsed on the truth of fulfillment of which the entire contract depends. Such stipulation may be on the face, margin or back of the policy, and whether it be material to the risk is not a question for the jury to consider.

Therefore, the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued, and are herein involved, was at the time he made such application, both a farmer and real estate agent, and unless you so believe you will find for defendant," which the court refused to give, to which action defendant then and there duly excepted.

720 All of which requested instructions were presented and said exceptions to the court's charge and refusal of special charges taken on June 2nd, 1900, in open court, at the proper time, before the jury retired to consider of their verdict.

The jury, on the night of Saturday, June 2nd, 1900, returned a verdict in favor of plaintiff, finding amounts of principal, interest, attorneys' fees, and damages separately, but judgment was not then entered, and before the entry of judgment and within the required time, to wit, on Monday, June 4th, 1900, a motion for new trial was duly filed herein by defendant, which, by leave of the court, was duly amended by amendment duly filed on the 25th day of June, 1900, on which day said motion was duly presented to the court and then and there overruled; whereupon defendant then and there duly excepted to the action of the court and gave notice of appeal.

That thereafter and before the entry of final judgment, and on the 4th day of July, 1900, plaintiff filed a motion for leave to remit a certain portion of the amount of the verdict, as shown by said motion, to wit, the sum of $3,375.00, service of which motion was then and there duly accepted by defendant; and thereupon, on said last-named date, the court permitted the plaintiff to remit said sum of $3,375.00; and thereupon, on the 4th day of July, 1900, entered final judgment on said verdict in favor of plaintiff, for the sum of $21,550.00; to all of which defendant then and there, on the date last aforesaid, in open court, duly excepted.

This bill of exceptions, at the request of the defendant, is duly allowed and approved by me, the said Edward R. Meek, judge, and made a part of the record in this case, and I hereto set my hand and seal, *nunc pro tunc* (within the time allowed for preparing and filing same, as appears by my orders, duly entered for this purpose during the term in the minutes of said court, expressly extending the time therefor,) on this the 29th day of August, 1900.

EDWARD R. MEEK,
U. S. District Judge.

721 The foregoing has the following endorsements, to wit: No. 2118. Jennie M. Mettler *v.* Fidelity Mutual Life Association. Bill of exceptions. Filed 1 day of Sept., 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

722 JENNIE M. METTLER
v.
THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA.

Charge of the Court.

GENTLEMEN OF THE JURY: The plaintiff, Jennie M. Mettler, sues the defendant, The Fidelity Mutual Life Association of Philadelphia, to recover on three policies of insurance of five thousand dollars each, which policies of insurance were taken out by Wm. A. Hunter on his life. The plaintiff is named as the beneficiary in each of these policies of insurance.

The plaintiff also sues to recover of the defendant association 12 per cent. damages on the amount of her loss, to-wit, $15,000.00, and interest thereon together with all reasonable attorneys' fees incurred in the prosecution and collection of her claim against the defendant association. She seeks to recover 12 per cent. damages and attorneys' fees above mentioned under and by virtue of a statute of the State of Texas, allowing same in certain cases.

Wm. A. Hunter, the insured had a right in law to insure his life in favor of his sister Mrs. Mettler.

It is shown by the three policies of insurance and the receipts for the premiums paid thereon, which are in evidence, that the insurance under the policies became effective on the 31st day of October 1896, and continued in effect up to the 28th day of April 1897—the premiums on the policies having been paid up to that date.

It is alleged that the insured Wm. A. Hunter, died on or about the 4th day of December 1896, so that the insurance under those policies was effective at the time the insured is alleged to have died.

In order for the plaintiff to recover in this action, it is necessary for her to prove by a preponderance of the evidence, that her brother Wm. A. Hunter, is dead, and that he came to his death on or about the 4th day of December, 1896, and within the
723 term during which the policies of insurance ran and were effective.

While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead.

By "proof to your satisfaction" as applied in this case, is meant that when you come to weigh and balance the evidence as to the probability of Hunter's being alive or dead, your mind shall arrive at the conclusion of his death. The law is satisfied with less than a certainty, yet requires a preponderance of proof establishing the fact of his death. Death, like any other fact, can be shown by circumstantial evidence, reasonably showing, that according to human experience, it is more probable that the person is dead than that he is alive.

If from the evidence in this case you shall come to the conclusion that Hunter has been continually absent since December 3, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. Reputation in his family on the part of his father, sisters and brothers, of his death, is proper evidence for your consideration, but not the opinion of anyone, and in considering the reputation which exists in his family, you should consider the facts and circumstances upon which the reputation of death is founded. You should also consider the failure if there has been a failure, of those most likely to hear from him, to get any news or learn of his whereabouts since the
724 date of his alleged disappearance on December 3, 1896. You should also take into consideration the evidence as to Hunter's character, disposition, habits, domestic relations, circumstances of life, declarations and the immediate facts and circumstances surrounding his disappearance.

Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to have been alive and in health at the time of his disappearance, continues to live. While the death of Hunter is not to be presumed from absence alone, it is yet a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence.

Much evidence has been introduced before you in relation to the starting of Hunter from Pecos to Mentone. You have heard in great detail the circumstances surrounding the finding of the outfit with which Hunter started on his trip from Pecos to Mentone, at a point on the bank of the Pecos river, and the conditions which existed at that place. It is the theory of the plaintiff that Hunter came to his death by drowning in the Pecos river near the point where his wagon and outfit were found. You should carefully consider and weigh all the facts and circumstances which have been detailed before you in relation to the finding of his wagon and outfit and the conditions at the camp in connection with the other evidence in the case, in reaching your conclusion as to whether or not Hunter met his death at the time and in the manner alleged by plaintiff.

If you come to the conclusion that Hunter met his death at or about the time alleged in plaintiff's petition as the date of his death

and in the manner therein named, to-wit: by being drowned in the Pecos river, it would be your duty to find for the plaintiff.

It is the theory of the defendant that Wm. A. Hunter did not come to his death at the time and in the manner contended by plaintiff. Evidence of circumstances relating to his disappearance and of the condition of things found at his camp on the bank of the Pecos river, have been introduced before you in support of the theory of the defendant. The evidence of witnesses is also before you tending to show that Wm. A. Hunter has been seen on two
725 occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then of course it would be your duty to find for the defendant.

You are exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proven, but you will be controlled as to the law of the case by the charge of the court.

If under the foregoing charge you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with six per cent. interest thereon from December 2nd, 1897, which is the date on which this suit was instituted in the State court, down to this date, June 2nd, 1900; and also 12 per cent. on the total of the face of the policies and interest, as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss, and your verdict should separate the amounts found as principal, as interest and as damages, and the amount found as reasonable attorneys' fees.

In event you should find for the plaintiff, I give you for your assistance, a form for your verdict:

"We the jury find for the plaintiff, and assess her damages as follows:

$15,000.00 as principal;

$—— as interest at the rate of 6 per cent. from December 2nd, 1897, to June 2nd, 1900;

$—— the sum being 12 per cent. damages on the amount of $15,000.00 and interest thereon at 6 per cent.;

$—— as reasonable attorneys' fees."

If under the foregoing charge your verdict should be for the defendant, you will simply say:

"We the jury find for the defendant."

(Signed) EDWARD R. MEEK, Judge.

726 Endorsed as follows: No. 2118 law. Jennie M. Mettler *v.* Fidelity Mutual Life Ass'n. Charge of court. Filed 2 day of June 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

727 In the United States Circuit Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118.

The defendant moves the court to set aside the verdict herein rendered, and grant it a new trial, for the following reasons, to-wit:

1.

Because the court erred in overruling defendant's special exception to that part of plaintiff's first amended original petition claiming attorney's fees, and statutory penalty.

2.

Because the court erred in admitting the evidence of W. A. Hunter, Sr., Clara Hunter, Charles E. Hunter and other members of the Hunter family and relatives tending to establish the family repute concerning the death of William A. Hunter, Jr., the alleged deceased, as shown by bill of exceptions No. —.

3.

The court erred in allowing F. M. Etheridge to testify concerning the value of attorney's services; and in instructing the jury in his general charge that if they found for the plaintiff to find 12 % damages on the amount of the policy, and interest thereon, together with all reasonable attorney's fees incurred in the prosecution and collection of her claim, because the same is contrary to section 1, art. 14 of the amendments to the Constitution of the United States, and to the constitution and statute of the State of Texas.

728 4.

The court erred in that portion of his general charge as follows, to-wit:

"The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

Because it required the jury to believe from the evidence that both witnesses had seen the absentee when proof that either had seen him was sufficient to defeat recovery herein.

5.

Because the court erred in refusing to give special charge No. 1 asked by defendant.

6.

Because the court erred in refusing to give special charge No. 2 asked by defendant.

7.

Because the court erred in refusing to give special charge No. 3 asked by defendant, and in failing to submit the question of whether the assured, W. A. Hunter, Jr., was a real estate agent and farmer as a question of fact to the jury, and in assuming in his general charge that such fact was beyond dispute.

8.

Because the court erred in refusing to give special charge No. 4 asked by defendant.

729

9.

Because the court erred in refusing to give special charge No. 5 asked by defendant.

10.

Because the court erred in refusing to give special charge No. 6 asked by defendant, and in failing to apply the doctrine of "specific peril" in any manner to the facts of this case, or to give any charge thereupon.

11.

Because the verdict is contrary to law.

12.

Because the verdict is contrary to and without the support of the evidence.

13.

Because the verdict is excessive.

Respectfully submitted,

JOHN W. WRAY,
PERKINS, GILBERT & PERKINS,
Att'ys for Defendant.

Indorsed as follows: No. 2118. Jennie M. Mettler *v.* The Fidelity Mutual Life Association. Motion for new trial. Filed 4 day of June, 1900, at — o'clock — m. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

730 JENNIE M. METTLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118.

On May 28th, 1900, this cause was regularly called for trial, and came the parties plaintiff and defendant by their respective attorneys and announced ready for trial; then came on to be heard by the court the general and special exceptions of the defendant in its second amended original answer to the first amended original petition of the plaintiff, which exceptions, general and special, upon consideration thereof are by the court overruled, except the special exceptions marked *c*, *d*, *e* and *f*, which are by the court sustained, defendant having admitted in open court the sufficiency of the preliminary proofs of death and claim referred to in paragraphs five, six, seven and eight of said petition, to which ruling of the court the plaintiff and defendant then and there excepted; and then came on to be heard by the court the demurrer of the defendant in its supplemental answer to all that portion of plaintiff's first supplemental petition following the general denial, which upon consideration the court overruled, to which ruling the defendant excepted; and then came a jury of twelve good and lawful men, to-wit: R. A. Ware, W. R. Hudson, C. B. Curtis, Geo. Newsome, S. G. Sheppard, W. P. Green, J. J. Hardiman, J. F. Knox, B. R. Park, C. E. Hunt, T. L. Bradford, E. M. Kahn, who were duly and legally elected, empaneled and sworn to try this cause, and who having heard the pleadings, evidence, argument of counsel and charge of the court, retired to consider of their verdict, to-wit:

DALLAS, TEX., June 2nd, 1900.

"We, the jury, find for the plaintiff, and assess her damages as follows:

"$15,000.00 as principal;

"$2250.00 as interest at rate 6% from Dec. 2nd, 1897 to June 2nd, 1900

"$5175.00, the same being 12% damages on the amount of $15,000.00

731 "And interest thereon at 6%;

"$2500.00 as reasonable attorney's fees.

E. M. KAHN, Foreman."

And the plaintiff Jennie M. Mettler having, after the return of the verdict aforesaid, duly remitted during the term in open court on, to-wit: July 4th, 1900, the sum of three thousand three hundred and seventy-five ($3375.00) dollars of said five thousand one hundred and seventy-five ($5175.00) dollars damages, leaving $1800.00 on the item of 12% damages on the amount of the loss, which remittitur is here allowed;

It is therefore considered by the court, and it is so ordered, adjudged and decreed that the plaintiff Jennie M. Mettler, do have

and recover of and from the defendant, The Fidelity Mutual Life Association, of Philadelphia, the sum of twenty-one thousand five hundred and fifty ($21,550.00) dollars, with interest thereon from the date of this judgment at the rate of six (6%) per centum, together with all costs herein incurred and expended, for which execution may issue.

It is further ordered by the court that the officers of court and all persons to whom costs are due, do have and recover of and from said plaintiff and defendant the costs by each of them respectively incurred, for which execution may also issue.

Indorsed as follows: In the circuit court of the U. S., for the northern district of Texas, at Dallas. No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Judgment.

732 Defendant's Tenth Assignment of Error in Mettler *v.* Fidelity Mutual Life Association.

10. The court erred in refusing special charge No. 1, asked by defendant, as follows:

"You are instructed to find for defendant because the verdict is unsupported and unwarranted by the testimony in that there is no evidence establishing or tending to establish in a legitimate manner the death of the insured, and because the most that can legally be claimed from the testimony is that it establishes a case of disappearance, and that only, and because the overwhelmingly and preponderating facts, unimpeached in the record, have established that the assured did not meet his death at the time and place and in the manner alleged by plaintiff, and that he is not now dead."

733 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Whereas, lately in the circuit court of the United States for the northern district of Texas, before you or some of you, in a cause between Jennie M. Mettler, plaintiff, and The Fidelity Mutual Life Association of Philadelphia, defendant, No. 2118, wherein the judgment of the said circuit court, entered in said cause on the 4th day of July, A. D. 1900, is in the following words, viz:

"On May 28th, 1900, this cause was regularly called for trial, and came the parties plaintiff and defendant, by their respective attorneys, and announced ready for trial; then came on to be heard by the court the general and special exceptions of the defendant in its second amended original answer to the first amended original petition of the plaintiff, which exceptions, general and special, upon

consideration thereof, are by the court overruled, except the special exceptions marked *c*, *d*, *e* and *f*, which are by the court sustained, defendant having admitted in open court the sufficiency of the preliminary proofs of death and claim referred to in paragraphs five, six, seven and eight of said petition; to which ruling of the court the plaintiff and defendant then and there excepted, and then came on to be heard by the court the demurrer of the defendant in its supplemental answer to all that portion of plaintiff's first supplemental petition following the general denial which, upon consideration, the court overruled; to which ruling the defendant excepted, and then came a jury of twelve good and lawful men, to wit: R. A. Ware, W. R. Hudson, V. B. Curtis, Geo. Newsome, S. G. Sheppard, W. P. Green, J. J. Hardiman, J. F. Knox, B. R. Parks, C. E. Hunt, T. L. Bradford and E. M. Kahn, who were duly and legally elected, empannelled and sworn to try this cause, and who, having
734 heard the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on June 2nd, 1900, returned into open court the following verdict, to-wit:

"DALLAS, TEXAS, June 2nd, 1900.

We, the jury, find for the plaintiff and assess her damages as follows: $15,000 as principal; $2,250.00 as interest at rate 6% from Dec. 2nd, 1897, to June 2nd, 1900; $5,175.00, the same being 12% damages on the amount of $15,000.00 and interest thereon at 6%; $2,500.00 as reasonable attorneys' fees.

E. M. KAHN, Foreman."

And the plaintiff, Jennie M. Mettler, having, after the return of the verdict aforesaid, duly remitted, during the term, in open court, on, to wit, July 4th, 1900, the sum of three thousand and three hundred and seventy-five ($3,375.00) dollars of said five thousand one hundred and seventy-five ($5,175.00) dollars damages, leaving $1,800.00 on the item of 12% damages on the amount of the loss, which remittitur is here allowed, it is, therefore, considered by the court, and it is so ordered, adjudged and decreed, that the plaintiff, Jennie M. Mettler, do have and recover of and from the defendant, The Fidelity Mutual Life Association of Philadelphia, the sum of twenty-one thousand five hundred and fifty ($21,550.00) dollars, with interest thereon from the date of this judgment at the rate of six (6%) per centum, together with all costs herein incurred and expended, for which execution may issue.

It is further ordered by the court that the officers of court and all persons to whom costs are due do have and recover of and from said plaintiff and defendant the costs by each of them respectively incurred for which execution may also issue," as by the inspection of the transcript of the record of the said circuit court, which
735 was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and one, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged, by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas; and that the said plaintiff, Jennie M. Mettler, recover against the said defendant for the costs herein expended and have execution therefor.

May 5, 1902.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of June, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Costs of Plaintiff.

Clerk	$—	Paid
Printing record	—	by
Attorney	—	def't.
	$—	

Indorsed as follows: 2118. Supreme Court of the United States. No. 165, October term, 1901. The Fidelity Mutual Life Ass'n of Phila. *vs.* Jennie M. Mettler. Mandate. Filed 17 day of June, 1902, at — o'clock — m. J. H. Finks, clerk, by W. A. Porter, deputy.

736 (The face of draft contains the following words and figures, to-wit:)

3505. The Fidelity Mutual Life Insurance Company,

$24028— 6/3 PHILADELPHIA, May 29th, 1902.

$24028.25. Dead.

Pay to the order of J. H. Finks, clerk U. S. circuit court,
Check on mortuary fund.

Pennsylvania. Dallas, Texas, in full of judgment in the case of Mettler *vs.* Fidelity Mutual Life Association, with interest thereon to June 4th 1902,—twenty-four thousand twenty-eight and 25/100 dollars.

THE REAL ESTATE TRUST CO.
OF PHILADELPHIA, PA.

File with application No. 73372.

O. C. BOSBYSHELL, Treasurer.
F. F. QUINN, Ass't Secretary.

The draft has the following words and figures, written, printed or stamped on back thereof:—

Pay to E. J. Gannon, cash'r or order,

J. H. FINKS,
Clerk U. S. Circuit Court, Dallas.

Pay to the order of any bank or banker,

THE AMERICAN NATIONAL BANK OF DALLAS, TEXAS.
E. J. GANNON, Cashier.
FARMERS' & MECHANICS NAT'L BANK, PHILADELPHIA.

(Printed on a slip of paper and pasted on back of draft is the following:)

The Fidelity Mutual Insurance Co., Philadelphia.
Form 348—(E).

The draft is perforated as follows:—Paid—6-6 '02

737 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff,
v.
JENNIE M. SMYTHE, JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.
No. 597. In Equity.

Plaintiff's Assignment of Errors.

In connection with its petition for an appeal this day filed in the above styled cause, the plaintiff assigns the following errors committed upon the trial thereof.

1.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant William H. Clark, and dismissing its bill of complaint as to said defendant.

2.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Morris A. Spoonts, and dismissing its bill of complaint as to said defendant.

3.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Charles A. Culberson, and dismissing its bill of complaint as to said defendant.

4.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Phillips Investment Company, and dismissing its bill of complaint as to said defendant.

738

5.

The court erred in not granting to the plaintiff the relief prayed for in its bill of complaint as against each of the defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company.

For the reasons hereinbefore assigned, the plaintiff prays that the decree entered in said cause February 25, 1905, be reversed by the Supreme Court of the United States, in so far as the same relates to the issues between the plaintiff and the several defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

Indorsed as follows: # 597, Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe, *et al.* Plaintiff's assignment of errors. Filed 1 day of May, 1905, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

739 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

The Fidelity Mutual Life Insurance Company, Plaintiff, *v.* Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	No. 597.	In Equity.

Plaintiff's Petition for Appeal.

To the Honorable Edward R. Meek, United States district judge for the northern district of Texas:

The Fidelity Mutual Life Insurance Company, the plaintiff in the above styled cause, conceiving itself aggrieved by so much of the decree therein entered on February 25, 1905, as orders "that the

plaintiff take nothing by its suit against the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, and that as to said defendants its bill of complaint be dismissed," does hereby appeal from all that portion of said decree to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith; and it prays that its appeal be allowed, and that a transcript of the record, proceedings, papers and proofs upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

MAURICE E. LOCKE,
Solicitor for Plaintiff.

740 The foregoing claim of appeal is allowed, at Dallas, Texas, this the 1st day of May, A. D. 1905.

EDWARD R. MEEK,
U. S. District Judge, Northern District of Texas.

Indorsed as follows: # 597 Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Plaintiff's petition for appeal. Filed 1 day of May, 1905, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

741 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

THE FIDELITY MUTUAL LIFE INSURANCE Company, Plaintiff, *v.* JENNIE M. SMYTHE JAMES N. SMYTHE, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, Defendants.	No. 597.	In Equity.

Plaintiff's Appeal Bond.

Whereas, in the above styled cause, then pending in the circuit court of the United States for the northern district of Texas, sitting at Dallas, said court did, on to-wit February 25, 1905, render a final decree determining the matters in controversy between the plaintiff and each of the several defendants. And, whereas, said decree, as between the plaintiff and the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company is "that the plaintiff take nothing by its suit against the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, and that as to said defendants its bill of complaint be dismissed." And whereas, the portion of said decree relating to the controversies between the plaintiff and said four named defendants is wholly separate from and independent of

the portion thereof relating to the controversies between the plaintiff and the remaining defendants. And whereas, the plaintiff has taken an appeal to the Supreme Court of the United States to reverse so much of said decree as orders "that the plaintiff take nothing by its suit against the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Com-
742 pany, and that as to said defendants its bill of complaint be dismissed."

Now, therefore, know all men by these presents, that the said plaintiff, The Fidelity Mutual Life Insurance Company, a private corporation having its domicile in Philadelphia, Pennsylvania, as principal, and as surety Fidelity and Deposit Company of Maryland, a private corporation having its domicile in Baltimore, Maryland, and authorized by its charter and by compliance with the laws of the State of Texas to do business as a surety company in Texas, do hereby acknowledge themselves jointly and severally bound unto the said defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, in the sum of two thousand dollars, well and truly to be paid to them or to their executors, administrators, or assigns.

The condition of this bond, however, is such that if said The Fidelity Mutual Life Insurance Company shall prosecute its appeal to effect, and, if it shall fail to make its plea good, shall answer all costs, then this bond shall become null; otherwise, it shall remain in full force and effect.

In testimony whereof, said The Fidelity Mutual Life Insurance Company has caused these presents to be signed in its name and behalf by Maurice E. Locke, its attorney of record, and agent thereunto duly authorized; and said Fidelity and Deposit Company of Maryland has caused these presents to be signed and its corporate seal to be thereunto affixed by H. H. Smith, its attorney-in-fact, and attested by J. B. Nabors, its general agent, both thereunto duly authorized, at Dallas, Texas, this the 1st day of May, A. D. 1905.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY,
By MAURICE E. LOCKE, Its Agent and Attorney.
743 FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
[L. S.] By H. H. SMITH, Its Attorney-in-fact.

Attest:
J. B. NABORS,
General Agent.

The foregoing bond is examined, approved and ordered filed, this the 1st day of May, A. D. 1905.

EDWARD R. MEEK,
United States District Judge for the
Northern District of Texas.

Indorsed as follows: # 597 Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Plaintiff's appeal bond. Filed 1 day of May, 1905, at — o'clock — m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

744 UNITED STATES OF AMERICA, ss:

The President of the United States to William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the circuit court of the United States for the northern district of Texas, and filed in the clerk's office of said court on the 1st day of May, A. D., 1905; in a cause wherein The Fidelity Mutual Life Insurance Company is the appellant and you are the appellees, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this the 1st day of May, A. D. 1905.

EDWARD R. MEEK,
United States District Judge for the
Northern District of Texas.

Attest with seal

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of the Circuit Court of the United
States for the Northern District of Texas,
By C. B. HOLLARN, Deputy.

745 Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 1st day of May, A. D. 1905.

WM. H. CLARK.

Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 1st day of May, A. D. 1905.

SPOONTS & THOMPSON,
Solicitors for Morris A. Spoonts.

Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 1st day of May, A. D. 1905.

F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Charles A. Culberson.

Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 1st day of May, A. D. 1905.

ALEXANDER & THOMPSON,
Solicitors for Phillips Investment Company.

746 [Endorsed:] No. 597. Equity. The Fidelity Mutual Life Insurance Company *v.* Jennie M. Smythe *et al.* Citation on appeal. Filed May 2d, 1905. J. H. Finks, clerk.

747 Clerk's Certificate.

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit, and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors and all the proceedings in cause No. 597 in equity, wherein The Fidelity Mutual Life Insurance Company is complainant and Jennie M. Smythe *et al.*, are respondents, except that the original citation on appeal is included therein, instead of a copy thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness, my hand officially and the seal of said court, at Dallas, Texas, this the 17th day of May, A. D. 1905.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, Clerk,
By C. B. HOLLARN, Deputy.

Endorsed on cover: File No. 19,771. N. Texas C. C. U. S. Term No. 270. The Fidelity Mutual Life Insurance Company, appellant, *vs.* William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company. Filed May 23d, 1905. File No. 19,771.

FILE COPY.

19,771.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 25

Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. MCKENNEY,

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY,
Appellant,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

LOCKE & LOCKE, Dallas, Texas,
SOLICITORS FOR APPELLANT.

Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY
v.
WILLAM H. CLARK ET AL.

19,771.
October Term, 1905.
No. 270.

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

1.

INTRODUCTORY.

In November, 1896, William A. Hunter procured from The Fidelity Mutual Life Association of Philadelphia, $15,000 of insurance upon his life in favor of his sister, Mrs. Jennie M. Mettler. In December, 1896, he disappeared under circumstances indicating his death by accidental drowning. Thereafter Mrs. Mettler instituted an action against the association upon the policies, and in July, 1900, she recovered in the Circuit Court of the United States for the Northern District of Texas, a judgment thereon for $21,550. In May, 1902, this court affiirmed the judgment: Fidelity Mutual Life Association v. Mettler, 185 U. S. 308. In June, 1902, the association, which in the meantime had changed its name to The Fidelity Mutual Life Insurance Company by an amendment of its charter, paid into the registry of the court the sum of $24,028.25, for the satisfaction of the principal and interest of the judgment. This sum was immediately distributed by the clerk among Mrs. Mettler and her

assigns, the defendants in the present suit. In April, 1903, William A. Hunter was captured in Birmingham, Alabama, near which city he was living under an assumed name. In May, 1903, the insurance company began this suit against Mrs. Mettler, who by remarriage had become Mrs. Jennie M. Smythe, and against all the other original distributees of the fund deposited in the court. The object of the suit was, (1) to restrain the defendants from making use of the judgment at law recovered by Mrs. Mettler as the basis of a plea of res adjudicata in any proceeding brought to reclaim the money paid under the judgment, and (2) to obtain a decree against each person who had received any of the money directly from the court, requiring him to restore the amount so received, together with interest thereon. All the parties defendant in the suit demurred, and upon the overruling of their demurrers answered. The case was heard upon the evidence, and resulted in a decree in favor of the insurance company as to Mrs. Smythe and her husband, but against the insurance company as to all the other defendants. From so much of the decree as denies to the insurance company a recovery of the moneys received by the defendants other than Mrs. Smythe, this appeal has been taken.

The jurisdiction of the Circuit Court of the United States for the Northern District of Texas was invoked because the requisite diversity of citizenship existed, and because in its nature the suit was ancillary to the original action at law in that court. The case has been brought directly to this court from the Circuit Court because it involves the construction or application of the Constitution of the United States.

For the convenience of the court, we copy here the plaintiff's bill, inserting in the proper places the averments of the two amendments made thereto, but omitting the caption, the verification, and the exhibits.

2.

THE PLAINTIFF'S BILL AS AMENDED.

"To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas:—

1.

The Fidelity Mutual Life Insurance Company, of Philadelphia County, Pennsylvania, and a citizen of the state of Pennsylvania, brings this its bill against Jennie M. Smythe and James N. Smythe, her husband, both of Licking County, Ohio, and both citizens of the state of Ohio, and William H. Clark and Charles A Culberson, both of Dallas County, Texas, and both citizens of the state of Texas, and Morris A. Spoonts, of Tarrant County, Texas, and a citizen of the state of Texas, and Phillips Investment Company, of Jackson County, Missouri, and a citizen of the state of Missouri. And thereupon your orator complains and says:—

2.

The plaintiff is a private corporation which long prior to the year 1896 was duly incorporated by the state of Pennsylvania under the name of The Fidelity Mutual Life Association of Philadelphia, and which on to-wit August 22, 1899, by amendment of its charter changed its name to The Fidelity Mutual Life Insurance Company, without, however, in any way losing its identity. Ever since a date anterior to the year 1896, the plaintiff has been transacting a life insurance business in the state of Texas by authority of said state. The defendant, Jennie M. Smythe, was married to the defendant, James N. Smythe, on or about March 26, 1903. Continuously from a date prior to October, 1896, until her said marriage, she was a widow and was named Jennie M. Mettler. The defendant, Phillips Investment Company, is a private

corporation duly incorporated by the state of Missouri long prior to October 29, 1901.

3.

1. In the latter part of October. 1896, one William A. Hunter, a brother of the defendant, Jennie M. Smythe, and then residing with her in Reeves County, Texas, visited the Texas office of the plaintiff in the city of Dallas, and there renewed an old acquaintance with the plaintiff's general agent Andrew J. Brown. He told said general agent that he was a farmer and real estate dealer; that he and his brother-in-law had purchased a considerable amount of land in the Pecos valley, and owed a good deal of money on the same; that his brother-in-law had died; that if he should die his sister, the said defendant, would lose what they had paid; and that for this reason he thought of taking insurance upon his life in order that his said sister might be able to pay the amount owing upon the land if he should die. Said statements were materially false, and were made to deceive said general agent, and did deceive him and lead him, and through him the plaintiff, to believe that the said Hunter had a legitimate reason for procuring upon his life a considerable amount of insurance in favor of his said sister.

2. In pretended pursuance of said purpose, the said William A. Hunter, on to-wit October 28, 1896, made written application to the plaintiff, through its said general agent, for three policies of insurance upon his life, each to be of the sum of five thousand dollars, and all to be payable to his said sister. The plaintiff accepted his proposition so made, and under date of October 31, 1896, issued to him its three policies numbered respectively D 73372, D 73373, and D 73374. By each of said policies the plaintiff promised that, subject to certain conditions not relevant to the present bill, within ninety days after its acceptance of due and satisfactory proof of the death of said William A.

Hunter, it would pay to his said sister, Jennie M. Mettler (now the defendant, Jennie M Smythe), the sum of five thousand dollars if she should survive him. On to-wit November 7, 1896, the plaintiff, through its said general agent, delivered said policies to said William A. Hunter, and received from him the first semi-annual premium thereon, amounting to ninety-seven and 65/100 dollars.

4.

1. On to-wit December 3, 1896, said William A. Hunter left the residence of the defendant, Jennie M. Smythe, in the town of Pecos, Texas, ostensibly to go for a trip of a week or ten days to a place in Loving County, Texas, about forty miles from Pecos. He took with him two horses, a wagon, camping utensils, and provisions for himself and team. After crossing the Pecos river near the town of Pecos and traveling for a distance of about fourteen or fifteen miles along the public highway leading to said point in Loving County, he left said highway and drove off about half a mile to a point near the east bank of the Pecos river. There he pitched a camp, and so arranged his bed, camp fire, camping utensils, food, and other provisions as to indicate that he had camped there over night. He removed the harness from the horses and left it lying on the ground near the wagon, and tying one horse to a tree left it so that it should afterwards be found dead with the appearance of having perished from starvation. He then walked down to and over the upper edge of the steep bank of the river, leaving his footsteps plainly imprinted in the sand, and carefully made his way thence without leaving any trail, so that it should appear to anyone examining the camp that he had fallen into the river and been drowned. The other horse was found soon thereafter in the town of Barstow, a station on the Texas and Pacific Railway, whither, as the plaintiff

verily believes, he had ridden it on the night of December 3, 1896, turning it loose near said town with no accoutrement save a dangling rope, so that it should appear to have strayed from the camp.

2. Immediately after stealing away from his camp as aforesaid, William A. Hunter went into hiding, quitting the state of Texas, assuming a fictitious name, and ever thereafter concealing himself, so that he should not be found by the plaintiff, and so that the plaintiff and the public should not know that he was still alive but should believe that he was drowned in the Pecos river on the morning of December 4, 1896.

3. All this he did with the intent and purpose that his said sister, the defendant, Jennie M. Smythe, should represent to the plaintiff that he had been so drowned, and should make demand upon the plaintiff for the sum of fifteen thousand dollars in payment of its said policies, and should so deceive the plaintiff as to cause it to pay her said sum of money in the belief that he had been so drowned; and with the further intent and purpose that, if it should decline to pay the same, she should so impose upon and deceive the courts, and the judges and juries composing the courts, that they should believe he had been so drowned, and should compel the plaintiff to pay said sum together with all the interest, penalties, and costs to accrue thereon; and with the further intent and purpose that when she should have collected the proceeds of said policies the same should be divided between her and himself to the dishonest enrichment of them both.

4. Within the last few days the plaintiff has for the first time learned numerous facts and circumstances which give it strong reason to believe, and verily it does believe, that said William A. Hunter and his sister, the defendant, Jennie M. Smythe, conspired together from the beginning, and concocted

together this entire scheme of fraud, and that every step therein taken, from the first visit of said Hunter to the plaintiff's office in Dallas to the final collection and division of the money, was taken in pursuance of their mutual understanding and agreement.

5.

1. Thereafter, in or about the month of January, 1897, in pursuance of said fraudulent plan, and in ratification and adoption thereof, the defendant, Jennie M. Smythe, presented to the plaintiff her affidavit in due and regular form, as required by said three policies, showing that said William A. Hunter had died by drowning in said Pecos river on or about December 4, 1896, and made demand upon the plaintiff that it pay to her the sum of fifteen thousand dollars as and for the amount which his death had rendered due from it to her upon account of said three policies. Not being satisfied that said Hunter was dead, the plaintiff refused to make such payment.

2. Thereupon, on to-wit December 2, 1898, the said defendant, Jennie M. Smythe (whose name then was Jennie M. Mettler), instituted in the District Court of Dallas County for the Forty-fourth Judicial District of Texas against the plaintiff (whose name then was The Fidelity Mutual Life Association of Philadelphia), a suit in the nature of an action at law to recover from it upon account of said policies said sum of fifteen thousand dollars, together with interest, damages, and costs. On to-wit January 4, 1899, said suit was by the order of said district court duly removed to the Circuit Court of the United States for the Northern District of Texas, sitting at Dallas. There it remained for trial, being numbered 2118 upon the law docket of said court, and entitled Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia.

3. Said action was tried on May 28, 1900, and several succeeding days, on the following named pleadings, to-wit: the plaintiff's First Amended Original Petition, filed November 11, 1899, the defendant's Second Amended Original Answer, filed May 28, 1900, and the plaintiff's Amended First Supplemental Petition and defendant's Supplemental Answer, both filed May 28, 1900. A substantially correct copy of said pleadings, marked Exhibit A, is attached to and hereby made a part of this bill. In her said First Amended Original Petition the plaintiff alleged that the said William A. Hunter died on or about the fourth day of December, 1896; and in its said Second Amended Original Answer the defendant denied said allegation. The issue of fact so made was vital to the plaintiff's right of recovery, formed the principal subject of controversy at said trial, and was the only issue pertinent to this bill.

4. In support of her said allegation, the plaintiff in said action (here a defendant) introduced witnesses who gave a detailed account of the appearance of the camp arranged by William A. Hunter, as briefly set forth in Section 4 of this bill. She herself also as a witness described said camp, and recounted the circumstances attending the departure of Hunter from Pecos, her institution of a search for him, and her discovery of the policies sued upon, all in such a way as to lead the court, and especially the jury, to believe that said Hunter had in fact been accidentally drowned in the Pecos river on the morning of December 4, 1896. She, also, on or about December 30, 1896, wrote a letter to her father in Ohio, stating that said William A. Hunter had been drowned, and relating the circumstances tending to establish that fact as above mentioned; and so she created a family reputation that he had been drowned in the Pecos river on December 4, 1896. At said trial she introduced the depositions of several members of the family

proving the existence of such a family reputation, and herself testified to its existence.

5. The only evidence produced at said trial tending to establish as a fact the death of William A. Hunter was the evidence of the circumstances connected with his disappearance, the evidence of the family reputation that he was dead, and the fact that during the period of more than three years elapsing between his disappearance and said trial the defendant company had been unable to procure any direct and positive proof which the jury deemed worthy of credit that he had not died as alleged. But said family reputation was based entirely upon said circumstances and the statement thereof made by the plaintiff herself to the other members of the family. And said circumstances in turn, each and all, were manufactured by said Hunter, with the deliberate and carefully planned design of deceiving the defendant company, and deceiving the courts, and by means of such deceit swindling the defendant company out of the sum of fifteen thousand dollars or more for his own benefit and that of his said sister. The inability of the defendant company to procure convincing evidence of the fact that said Hunter had not been drowned but was still living was due solely to the studious care with which said fact was concealed by him, and as the plaintiff verily believes by her as well.

6. The plaintiff has much reason to believe, and verily it does believe, that the defendant, Jennie M. Smythe, knew at all times that her brother, the said William A. Hunter, was not dead; and that she knew where he was, and maintained a regular correspondence with him at all times during the pendency of said litigation; and that she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff; and that both by deliberate concealment and by direct perjury she withheld from the court the true

facts as the same were known to her, and prevented the plaintiff from procuring evidence to establish its defense.

7. Said trial resulted on June 2, 1900, in a verdict of the jury in favor of the plaintiff, procured from it by her solely by means of the frauds aforesaid. Upon said verdict, after the allowance of a remittitur of three thousand three hundred seventy-five dollars, a judgment was on July 4, 1900, duly entered by said Circuit Court that the plaintiff (here the defendant, Jennie M. Smythe) recover from the defendant (here the plaintiff) twenty-one thousand five hundred fifty dollars, together with interest thereon at the rate of six per centum per annum from and after said date, and all her costs of suit, and that she have execution therefor. Said sum was made up of fifteen thousand dollars allowed as the face of said three policies of insurance, two thousand two hundred fifty dollars allowed as legal interest thereon, and four thousand three hundred dollars allowed as attorneys' fees and damages, which in the exercise of its inscrutable wisdom the legislature of Texas had imposed upon the defendant company for failing to pay the plaintiff's claim promptly.

8. After the return of said verdict and before the entry of final judgment thereon, the defendant company filed a motion and an amended motion for a new trial of said cause; both of which motions were overruled by the court on June 25, 1900. Thereafter the defendant sued out a writ of error for the revision of said judgment by the Supreme Court of the United States. Said cause was heard by said Supreme Court as No. 165 of its October Term of 1901, and on May 5, 1902, the judgment of the Circuit Court was in all things affirmed by the Supreme Court.

9. Thereafter, on to-wit June 3, 1902, the defendant company (here the plaintiff) paid into the registry of said Circuit Court the sum of twenty-four

thousand twenty-eight and 25/100 dollars, being the principal sum of said judgment with all interest thereon accrued; and said sum was by the clerk of said Circuit Court on the said date paid to and distributed among the plaintiff in said cause and her assigns as hereinafter set forth. In addition to said sum the defendant company made sundry payments of accruing costs from time to time during the pendency of said litigation, and soon after its conclusion; and so it has discharged said judgment with all the costs of court, amounting to about one thousand five hundred dollars.

6.

1. On to-wit June 10, 1899, the defendant, Jennie M. Smythe (then Jennie M. Mettler, the plaintiff in said action at law), by a written instrument assigned and transferred to William L. Hall and the firm of Alexander, Clark & Thompson an interest in her said claim against the present plaintiff to the extent of one-third of the amount recovered for principal, interest, and statutory damages, plus two thousand five hundred dollars, plus any amount recovered for attorneys' fees. Said assignment was made as a part of a contract of employment, and to compensate the assignees for professional services rendered and to be rendered to the assignor in prosecuting her said claim against the present plaintiff, all the assignees being lawyers by profession, and being her attorneys in said litigation. In said written instrument it was further stipulated that the assignees might employ such associate attorneys as they should deem necessary, but only at their own expense for the fees of such associate attorneys.

2. Said firm of Alexander, Clark & Thompson was composed of William M. Alexander, William Thompson, and the defendant, William H. Clark. On to-wit May 29, 1902, said William M. Alexander,

William Thompson, and William L. Hall by a written instrument assigned and transferred to the defendant, William H. Clark, all their interest in said contract of employment and in the judgment hereinbefore described.

3. In the meantime, the defendants, Morris A. Spoonts and Charles A. Culberson, had been employed as associate attorneys under the provisions of said contract, and as such had rendered professional services in said litigation. As compensation for the services by them severally rendered, the defendant, William H. Clark, assigned and transferred to the defendant, Morris A. Spoonts, an interest of one thousand five hundred dollars in his share of the money paid into the court by the present plaintiff as aforesaid; and the defendants, Jennie M. Smythe and William H. Clark, assigned and transferred to the defendant, Charles A. Culberson, an interest of one thousand twenty-six dollars in said judgment and cause of action and said fund therefrom arising.

4. On to-wit October 29, 1901, the defendant, William H. Clark, being indebted to the defendant, Phillips Investment Company, upon his promissory note for the principal sum of one thousand four hundred seventy-one and 57/100 dollars, by a written instrument assigned and transferred to said Phillips Investment Company, as collateral security for said note, his entire interest in said judgment.

5. In pursuance of said transfers, the clerk of said Circuit Court on to-wit June 3, 1902, paid out as follows the said sum of twenty-four thousand twenty-eight and 25/100 dollars, which the present plaintiff had deposited in court to discharge said judgment as above set forth. He paid to the defendant, William H. Clark, the sum of eight thousand three hundred forty-six dollars; to the defendant, Morris A. Spoonts, the sum of one thousand five hundred dollars; to the defendant, Charles A. Cul-

berson, the sum of one thousand twenty-six dollars; to the defendant, Phillips Investment Company, the sum of one thousand five hundred forty and 25/100 dollars; and to the defendant, Jennie M. Smythe, through William H. Clark, as her attorney of record, the remaining sum of eleven thousand six hundred sixteen dollars. No one of the defendants ever has returned to the plaintiff, directly or indirectly, any portion of the money so received by him, but each has converted to his own use the entire sum paid to him:—saving, however, that the defendant, Jennie M. Smythe, as the plaintiff has strong reason to believe, and verily does believe, has paid over to her said brother and co-conspirator, William A. Hunter, a large portion of the money so received by her.

7.

1. The said William A. Hunter was not drowned on December 4, 1896, as alleged and found by the jury in said action at law, but he still lives. At the date of filing this bill he is confined in the jail of Jefferson County, Alabama, by virtue of a warrant issued by the governor of Alabama for his arrest and surrender to the extradition agent of the state of Texas, to be tried in Texas upon a charge of swindling this plaintiff in the manner hereinbefore set out. He is so confined pending an appeal by him taken to the Supreme Court of Alabama from an order of the trial court refusing to discharge him upon a writ of habeas corpus. The fact that he still lives forms a complete and absolute defense to the action brought by the defendant, Jennie M. Smythe, against the plaintiff, in which said judgment was rendered.

2. Said fact was not discovered by the plaintiff, and was not known to the plaintiff or to any of its officers, attorneys, or agents, until April 27, 1903, ten months after said judgment had been rendered, affirmed, and fully paid and discharged. On April 27,

1903, the said William A. Hunter was found living under an assumed name in the state of Alabama, by one R. C. Milliken, who had for years been employed by the plaintiff in searching for him or for evidence that he had not died as alleged. Immediately after the disappearance of said William A. Hunter was announced in December, 1896, the plaintiff, believing that he had not been drowned as alleged, instituted a search for him or for proof that he was still living. Said search was thereafter continuously and diligently prosecuted by it during the entire time of the pendency of said litigation, at an expense of thousands of dollars, and by the use of all the resources at its command. But said search was constantly thwarted and rendered unavailing by the cunning deceits and concealments of said William A. Hunter, which he continually practiced in his own interest and that of his said sister, the defendant, Jennie M. Smythe, throughout the whole period of the pendency of said litigation and even after its termination. All of said deceits and concealments made in her behalf were adopted and ratified by said defendant, Jennie M. Smythe, and, as the plaintiff verily believes, were supported and aided also by her own acts of wilful deceit, concealment, and perjury, all as hereinbefore set out. And so the plaintiff was prevented from having a fair trial of said action at law, and was prevented from procuring the evidence required to establish its defense in said action, that is to say, to establish the simple fact that said William A. Hunter was not dead.

7½.

1. Sometimes the defendants William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company allege and pretend that each of them acquired his several interest in the judgment and the fund described in section 5 of this bill, for a valuable consideration by him then paid, in good

faith, and without notice of the fact that William A. Hunter did not die on or about December 4, 1896, as averred by the plaintiff in the aforesaid action of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. And they pretend that therefore they should not be called upon to return to the plaintiff its moneys severally received by them as set forth in section 6 of this bill. But your orator charges the truth to be as follows.

2. On to-wit October 27, 1897, before the institution of her said action, Jennie M. Mettler, by a written contract of that date, employed William M. Alexander, William H. Clark, and William L. Hall, attorneys at law doing business as co-partners under the firm name of Alexander, Clark and Hall, to institute and prosecute suit against The Fidelity Mutual Life Association of Philadelphia upon its three policies of insurance described in section 3 of this bill. By said written contract also, in consideration of the legal services rendered and to be rendered by them, she transferred and conveyed to said Alexander, Clark and Hall an undivided one-third interest in said three policies. Thereupon they instituted and prosecuted the said action for the common benefit of Jennie M. Mettler and themselves. Thereafter, on to-wit May 29, 1902, by written transfer endorsed thereon, William M. Alexander and William L. Hall assigned and transferred to William H. Clark all their right and interest in said contract. The plaintiff has reason to believe, and does believe and so alleges, that when said contract was made on October 27, 1897, William H. Clark knew that The Fidelity Mutual Life Association of Philadelphia denied that William A. Hunter was dead; and that he then knew that the principal work which he and his co-partners were undertaking by said contract was the effort to obtain an adjudication that said William A. Hunter was in fact dead; and that so he took the transfer contained in said con-

tract with actual notice of this plaintiff's rights and defenses. Thereafter, on to-wit June 10, 1899, the firm of Alexander, Clark and Hall having been dissolved, and the firm of Alexander, Clark and Thompson having been formed by William M. Alexander, William H. Clark, and William Thompson, the contract described in the first paragraph of section 6 of this bill was made by Jennie M. Mettler with Alexander, Clark and Thompson and William L. Hall, as a substitute for the aforesaid contract of October 27, 1897. When such new contract was made, said action had been pending for more than a year; and by its pleadings therein filed this plaintiff had denied that William A. Hunter had died as alleged, and so had given notice of its rights and defenses to all persons dealing with said action or the matters therein litigated. When said new contract was made, all the parties thereto had actual knowledge of the denial so made by this plaintiff. The sum of eight thousand three hundred forty-six dollars received by William H. Clark as set forth in section 6 of this bill was received by him solely by reason of and in pursuance of said two contracts, and especially of said contract of June 10, 1899. Said sum was paid to William H. Clark by the clerk of the court by means of his check No. 427 for eight thousand three hundred forty-six dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia.

3. The sum of fifteen hundred dollars received by Morris A. Spoonts as set forth in section 6 of this bill was paid to said Spoonts by the clerk of the court by means of his check No. 425 for fifteen hundred dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Associa-

tion of Philadelphia. Said Spoonts endorsed said check in blank and transferred the same to The Fort Worth National Bank of Fort Worth, Texas; to which bank it was paid June 6, 1902, by The American National Bank of Dallas by crediting its amount to the account current of said The Fort Worth National Bank. Such payment was made to said Spoonts by order of William H. Clark, and out of Clark's share of said judgment. Said order was given by said Clark, and was accepted and acted upon by said Spoonts and the clerk of the court, as an assignment of an interest of fifteen hundred dollars in the judgment and the fund deposited in court by this plaintiff wherewith to discharge the judgment. When said order was given and accepted, said Spoonts had been for a long time acting as attorney for Jennie M. Mettler in her suit against this plaintiff; and he had actual knowledge of its denial by its pleadings filed in said cause of the alleged death of William A. Hunter, and so had actual notice of this plaintiff's rights and defenses. He did not part with any new and valuable consideration in exchange for said assignment or said check, but accepted the same in satisfaction of an antecedent debt, to-wit of his fees for professional services theretofore rendered in said cause.

4. The sum of one thousand twenty-six dollars received by Charles A. Culberson as set forth in section 6 of this bill was paid to said Culberson by the clerk of the court by means of his check No. 426 for one thousand twenty-six dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. Said Culberson transferred said check by endorsement to The National Exchange Bank of Dallas; to which bank the same was paid June 12, 1902, through the Dallas

clearing house, by The American National Bank of Dallas. Such payment was made to said Culberson by order of William H. Clark, and, as this plaintiff upon good grounds verily believes and alleges, partly out of his own share and partly out of the share of his co-defendant, Jennie M. Smythe, in said judgment and fund. The plaintiff is informed, and it believes and so alleges, that such order was given chiefly in pursuance of a certain written assignment, which was executed under date of December 30, 1901, by the defendants Jennie M. Smythe and William H. Clark, whereby they assigned and transferred to the defendant Charles A. Culberson an interest of one thousand dollars in and to said judgment, and also the cause of action, that is, the policies of life insurance sued upon, as a contingent fee to the said Culberson for professional services to be rendered by him in their behalf in defending said judgment upon a writ of error in the Supreme Court of the United States. The plaintiff is informed, and it believes and so alleges, that the remaining twenty-six dollars of the sum so ordered to be paid to him out of said fund, was to reimburse him for a like amount theretofore expended by him in the printing of a brief for the defendant in error in said cause pending in the Supreme Court. The plaintiff upon good grounds believes, and it so alleges, that when said order was given and accepted, and when said written assignment was given and accepted, said Culberson had made a careful examination of the record in said cause pending in the Supreme Court and knew its contents; and that he knew that by its pleadings therein contained this plaintiff had denied that William A. Hunter was dead as alleged; and that he knew that one of the errors assigned by this plaintiff in the Supreme Court was the refusal of the trial judge to charge the jury peremptorily in its favor, upon the ground that there was no evidence that said Hunter

was dead, and that the evidence established the fact that he was not dead. And so when he accepted said assignment and order and check, said Culberson had actual notice of this plaintiff's rights and defenses.

5. The sum of fifteen hundred forty and 25/100 dollars received by Phillips Investment Company as set forth in section 6 of this bill was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25/100 dollars, drawn June 3, 1902, on The American National Bank of Dallas with instructions to pay the same out of the fund deposited in said cause of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. Phillips Investment Company endorsed said check and transferred it to the Bank of Montreal, which endorsed the same and transferred it to The Fourth Street National Bank of Philadelphia, which in turn endorsed the same and transferred it to The City National Bank of Dallas; and to said bank it was paid June 16, 1902, through the Dallas clearing house, by The American National Bank of Dallas. Said payment was made to Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6 of this bill. By said assignment, under date of October 29, 1901, William H. Clark assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows: 'All of my right, title and interest, that is my contingent attorney's fees of about $8000.00, in the cause of action and judgment of $21550.00, rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler v. Fidelity Mutual Life Association of Philadelphia, numbered 2118; said judgment rendered as aforesaid in favor of Mrs.

Jennie M. Mettler, and against said Association, from which judgment a writ of error is now pending in the Supreme Court of the United States.' Said assignment was given as collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy-one and 57/100 dollars, together with interest thereon at the rate of eight per centum per annum from date, such interest to be paid semi-annually and each installment thereof to bear interest at the rate of ten per cent. per annum from its maturity. Said note was given for a preexisting indebtedness. Said assignment was filed with the clerk of the court December 2, 1901. When said assignment was given and accepted, and when it was filed in the Circuit Court, said cause was pending in the Supreme Court, to which this plaintiff had removed it by a writ of error filed September 1, 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900. In accepting said assignment of such cause of action and such suspended judgment, Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe, and does believe, and so alleges, that in accepting said assignment Phillips Investment Company was acting under the advice of its attorneys,the aforesaid William M. Alexander and William Thompson, then doing business as copartners under the firm name of Alexander & Thompson. Said Alexander & Thompson, when they advised Phillips Investment Company to take such assignment, had actual knowledge as aforesaid that this plaintiff by its pleadings filed in said cause denied that William A. Hunter had died as alleged. This plaintiff further has reason to

believe, and does believe, and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of the alleged death of William A. Hunter, and that this plaintiff denied that he had died as alleged. Sometimes, however, Phillips Investment Company pretends that it can disregard said assignment, and rest its rights upon the check given it by the clerk of the court as aforesaid, and upon its surrender of said note in exchange therefor. As to this the plaintiff avers the truth to be, that said check was given solely because of and in pursuance of said assignment. And further it avers that in accepting such check and surrendering such note, Phillips Investment Company was represented by and acted only through, its said attorneys, Alexander & Thompson; and that they then and there had full knowledge of the main issue involved in said litigation, and knew that this plaintiff had always denied that William A. Hunter had died as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for said check, but accepted the same in discharge of antecedent indebtedness.

8.

To the end, therefore, that your orator may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court:—

1. That each and all of the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and

Phillips Investment Company, be restrained by the injunction of this honorable court from in any way making use of the aforesaid judgment, and especially from ever setting up said judgment by answer, plea, or demurrer as an adjudication that said William A. Hunter died in December, 1896, or as an adjudication that the plaintiff ever was indebted to them or any of them upon account of said three policies of insurance, or as tending in any way to justify them or any of them in receiving and converting to their own use the plaintiff's money paid to them severally as hereinbefore set out.

2. That each of said defendants, Jennie M. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, be decreed to repay to the plaintiff the sum of its money received by him as aforesaid, with legal interest thereon.

3. That your orator may have such further or other relief in the premises, as the nature of the circumstances of the case may require.

9.

May it please your Honors to grant to your orator a writ of subpœna, to be directed to the said defendants, Jennie M. Smythe, James N. Smythe, William H. Clark, Charles A. Culberson, Morris A. Spoonts, and Phillips Investment Company, thereby commanding them and each of them at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform, and abide by such order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

MAURICE E. LOCKE,
Solicitor and Counsel for Plaintiff."

Attached to the bill as exhibit A was a copy of the pleadings in the case of Jennie M. Mettler v. The Fidelity Mutual Life Association of Philadelphia. The most important issue raised by these pleadings, and the only one relevant to the present litigation, was that of the death of the insured. It was made by the defendant's plea of general denial(Tr., 17-18) to the plaintiff's allegations contained in the following words of her First Amended Original Petition: "That the said William A. Hunter died on or about the 4th day of December, 1896" (Tr., 11); and "Plaintiff avers that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered" (Tr., 12). The bill and amendments are to be found on pages 1-21, 30-34, and 73-76 of the transcript.

3.

PLEADINGS OF THE DEFENDANTS.

The defendants, Jennie M. Smythe and James N. Smythe, her husband, filed first a plea of privilege to be sued in Ohio (Tr., 27-28). This plea having been overruled (Tr., 28-29), they demurred (Tr., 35-38). Their demurrers in turn were overruled (Tr., 43), and they filed an answer, and, later, a supplemental answer, the substance of which was a denial of the charge of fraud preferred against Mrs. Smythe in the plaintiff's bill(Tr., 44-46 and 80-88). As they are not parties to this appeal, their pleadings require no further consideration.

All the defendants other than the Smythes joined in a demurrer (Tr., 25-26) and an amended de-

murrer (Tr., 40-42), and Phillips Investment Company filed a separate demurrer in addition (Tr., 38-40). Perhaps the objections to the bill presented, or intended to be presented, by these demurrers may fairly be stated as follows: (1) The provisions of the Seventh Amendment to the Constitution of the United States deprive the court of jurisdiction to entertain the suit. (2) The bill is wanting in equity. (3) No fraud is charged against any of the defendants other than Mrs. Smythe. (4) The bill is multifarious and misjoins parties defendant. (5)The fraud charged against Mrs. Smythe was the material issue in the action at law on the insurance policies. (6) The issue of the death of William A. Hunter was adjudicated and finally determined in the action at law. (7) The demurrants acquired in good faith, without notice of fraud, and for value, the fund sought to be recovered. (8) The bill does not propose to restore the demurrants to their former positions. The demurrers were overruled (Tr., 43-44); and each of the defendants filed an answer (Tr., 47-73), setting forth in detail the particulars of his acquisition of his interest in the fund, showing his personal good faith, and pleading the judgment as a final adjudication of the matters in controversy. Senator Culberson also pleaded in express terms the provisions of the Seventh Amendment (Tr., 72).

4.

DECISION OF THE CIRCUIT COURT.

The decree of the court granted to the plaintiff the relief sought against Mrs. Smythe and her husband, and denied that sought against the other defendants (Tr., 88-89). The learned district judge trying the case did not render a written opinion which might accompany the record. But perhaps we may be permitted to say, dehors the record, that he made

a brief and informal statement of his conclusions, in substance as follows:-

"I find from the evidence submitted in this case that the assured, William A. Hunter, is not dead, but living; and further, that the defendant, Jennie M. Smythe, and her brother, William A. Hunter, the assured, conspired together from the beginning, and concocted together the scheme to defraud the insurance company; that the inability of the insurance company to show on the trial of the case at law that Hunter had not met his death by drowning was due solely to the actions of himself and his sister, Mrs. Smythe; that they simulated a condition of facts tending to show that he was dead; and that they concealed the fact that he was living, studiously, carefully and persistently. I also find that diligence was used by the insurance company in attempting to ascertain and prove the fact that Hunter was living, on the trial of the insurance case, and that it was prevented from so doing by reason of the fraudulent conspiracy and acts of Jennie M. Smythe and her brother, the assured. I am of the opinion that the facts of this case bring it within the rule laid down by Chief Justice Marshall in the case of Marine Insurance Company v. Hodgson, 7 Cranch 332, cited and relied upon by the counsel for the complainant. The fact that Hunter was alive, was one of which the insurance company might have availed itself in the action at law, but it was prevented from so doing by the fraud of the defendant, Jennie M. Smythe, and her brother, the assured. There was no negligence on the part of the insurance company or its agents, which would preclude an appeal to a court of chancery. A great fraud was practiced upon the court, and an unconscientious advantage taken of the company without any fault or negligence on its part: New York Life Insurance Company v. Bangs, 103 U. S. 780. Clearly the relief sought by the complainant in its bill against Jennie M. Smythe and her husband, James N. Smythe, should be granted.

As to the defendants other than the Smythes, it is admitted by the complainant that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance compa-

ny in the suit at law. The defendants William H. Clark, Charles A. Culberson, and Morris A. Spoonts, were attorneys retained by the plaintiff, Jennie M. Mettler, at various stages in the suit at law, to represent her before the courts in the prosecution of her claim against the insurance company. They, and each of them, performed legal services for her in the prosecution of her alleged claim, and in contemplation and consideration of such services received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclose with particularity the manner in which each of the attorneys who are made defendants came into possession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved in order to show the interest and part of each under the judgment acquired, and also to show to what extent each participated in the fund. After consideration I have reached the conclusion that the rule enunciated and relied upon by the counsel for the complainant, with relation to the assignment of judgments, to the effect that an assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. The complainant seeks to follow the proceeds of the judgment into the hands of parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently received by the attorneys and innocently expended by them; and I cannot find any principle, either of law or of equity, which, under the circumstances, will compel restitution from them. It is true they were put on notice of the complainant's claim in the suit at law that Hunter was not dead, but living; but in the absence of corrupt knowledge on their part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned that judgment so entered concludes the insurance company.

The defendant, the Phillips Investment Company, is in quite as favorable an attitude as any of the defendant attorneys. It innocently received an as-

signment of a portion of the judgment from the defendant Clark as collateral security for a debt owing to it by him; and it participated in the fund paid into court in satisfaction of the judgment, and surrendered its evidence of indebtedness against Clark in consideration thereof. It is quite blameless in the premises, and as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity, which would compel the Phillips Investment Company to return what it has received under this judgment.

The view expressed here with relation to the attitude of the defendants other than the Smythes, should have led to the sustaining of the demurrers interposed and insisted upon by them. It now leads to the dismissal of the bill against them with their costs, and the decree will so provide."

SPECIFICATION OF ERRORS.

1.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant William H. Clark, and dismissing its bill of complaint as to said defendant.

2.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Morris A. Spoonts, and dismissing its bill of complaint as to said defendant.

3.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Charles A. Culberson, and dismissing its bill of complaint as to said defendant.

4.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant Phillips

Investment Company, and dismissing its bill of complaint as to said defendant.

5.

The court erred in not granting to the plaintiff the relief prayed for in its bill of complaint as against each of the defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company (Tr., 500-501).

THE PROOF OF FRAUD.

The evidence taken for the purpose of establishing the existence of a conspiracy between Mrs. Smythe and her brother to defraud the insurance company is very voluminous. Probably we can be of most assistance to the court in reaching a clear conception of the facts of the case by giving it a narrative of the transactions with some running comment on their peculiarities.

1.

Antecedent Conditions.

William A. Hunter and Jennie M. Mettler (Smythe) are brother and sister. They came to Texas about 1886 (Tr., 415) from Licking County, Ohio, where their father and several brothers and sisters still live. For a time Hunter was bookkeeper in a grocery at Alvarado, Texas (Tr. 217 and 220). Then he lived at Quanah, Texas, being first in partnership with his brother-in-law, S. L. Mettler, in a real estate business, and afterwards a deputy in the office of the district and county clerk (Tr., 180, 217 and 220). About 1893, at the time of the organization of Loving County, he went to Mentone in Loving County, where he became sheriff and tax collector and was engaged in an attempt to construct an irrigation plant (Tr., 95, 107, 375, and 150). His brother-in-law, Mettler, was county attorney of Loving County, and was engaged in the same irrigation scheme (Tr., 109).

Loving County is in western Texas, near the New Mexico line, on the east side of the Pecos River, and about twenty to fifty miles north of the Texas and Pacific Railway. It was attached to Reeves County for judicial purposes, and in 1894 had one resident poll tax payer (Tr., 107). It was organized in 1893 on a petition signed by about 175 persons, most of whom were Mexicans employed by the irrigation company (Tr., 107, 151 and 155). The irrigation project was abandoned about 1894 or 1895, the company becoming insolvent (Tr., 107-108 and 151). When this happened, the inhabitants of Loving County left, and the county was depopulated. In 1896 scarcely any one was living there, and then, or soon after, Mentone was in the midst of a ranch (Tr., 108, 151, and 147). No taxes were assessed and collected for the years 1895 and 1896, and in May, 1897, the county was disorganized by legislative act (General Laws of Texas of 1897, chapter 143).

Hunter appears to have been away for the most of 1895, and to have left there finally in March, 1896 (Tr., 96, 152, 375, and 217). Mettler died in March, 1896 (Tr., 415), and Mrs. Mettler (Smythe) went to Pecos City to live (Tr., 373). During the most of 1896, and perhaps of 1895, Hunter seems to have been at Dallas and Ft. Worth, and without remunerative employment. For several months in the summer of 1896 he was working in a photograph gallery for his board and expenses (Tr., 217, 171, and 172). During this time he had a small and inactive account at the City National Bank of Dallas (Tr., 187-189). So far as Mrs. Mettler knew, he had in October, 1896, no property, except his claim to a section of land in Loving County, the note of R. H. Paschal for a balance of $180, a note against the estate of S. L. Mettler for $556.80, a note against his brother, C. R. Hunter, for $240, about $1500 of Loving County script, and a claim of $70 or $80 against the state for collect-

ing taxes (Tr., 400 and 401). Probably all of this was considered worthless, though the Paschal note was afterwards collected by Mrs. Mettler (Tr., 153-154). While Mrs. Mettler was in Pecos in 1896 she was in straitened circumstances, living with different families, and sewing for them (Tr., 95, 119, 374 and 153). Her husband left her no property of any kind, and she supported herself from the time of his death to the time of trying her insurance case in 1900 (Tr., 417 and 374). Her brother, William A. Hunter, contributed nothing to her support (Tr., 376). In September, 1893, and January, 1894, Hunter bought two sections of Loving County land from the state of Texas under what was known as the forty year act, paying for each $32 in cash, and his note for $1248. But these sections were forfeited for non-payment of the interest, of 5 per cent., to August 1, 1895 (Tr., 396). One of these sections, No. 46, was the section referred to by Mrs. Mettler as constituting a part of his property in October, 1896. It was situated about two and one-half miles from the Pecos River, and had no improvements on it (Tr., 401 and 420). When the insurance was effected, Hunter was an unmarried man, thirty-three years old, and Mrs. Mettler (Smythe) was a widow, without children, and thirty-five years old (Tr., 393, 398, and 415).

2.

THE INSURANCE OBTAINED.

As early as January, 1896, two months before her husband's death, Mrs. Mettler and Hunter had talked of insuring his life (Tr., 400). About October 28, 1896, Hunter called at the office of Andrew J. Brown, in Dallas, state agent for the Fidelity Mutual Life Association. Brown had known him at Alvarado, and met him at Quanah, but had not seen him subsequently. After a general conversation and renewal of acquaintance, Hunter told Brown that he and

Mettler had gone from Quanah to Pecos City, and there had bought up a large body of Pecos Valley land and engaged in an irrigation scheme which had fallen through. He said Mettler had died and left a widowed sister on his hands, and that if he should die, his sister would lose what they had put into the land (Tr., 220). This was colorable, but false. The insurance scheme had been broached before Mettler's death (Tr., 400). Mettler had left no property of any kind to his wife (Tr., 417). Hunter never contributed a cent to her support after the death of her husband (Tr., 376). Hunter and Mettler had not bought a large body of Pecos Valley land; but Hunter had invested $64 in two sections, which had long since become subject to forfeiture for non-payment of interest (Tr., 396). Hunter told Brown that he lived at Pecos City, and that his occupation was real estate and farming (Tr., 221, 388, and 393). This was false. He did not live at Pecos City, and perhaps never had lived there (Tr., 375). He was not engaged in the business of real estate and farming, but was without employment or fixed place of residence. So far as known, he never had been engaged in farming, save that while at Mentone he devoted a tiny patch of arid land to experimental truck raising, watering it with buckets (Tr., 420). He applied for $15,000 of insurance in favor of his sister, selecting a very cheap form of policy, and stating that he would furnish the money to keep it in force (Tr., 394). He paid the premium for six months, $97.65, by giving his check on the City National Bank for more than one third of the amount of his balance there Tr., 221 and 189). He stayed around Dallas until November 7th, when the policies applied for were delivered to him in person by Brown (Tr., 222). Then he went to the City National Bank and withdrew his entire balance of $163.30, thus closing the account which he had carried there for more than two years (Tr., 187 and 189). Af-

ter that he was seen no more in Dallas, until he was brought back by the sheriff in November, 1903 (Tr., 222); and he paid no subsequently accruing premiums on the insurance.

3.

HUNTER'S VISIT TO PECOS CITY.

About three weeks after getting his insurance policies in Dallas, Hunter appeared in Pecos City, some 435 miles west of Dallas, where he had not been before for eight months (Tr., 96). Mrs. Mettler had been in correspondence with him (Tr., 376); and evidently she knew in advance of this visit and of its pretended purpose, since she had made arrangements to get her own horse in from the country, and to borrow another (Tr., 147-148, 400, and 142). Here he spread the report that he was going up to Mentone to live out his period of occupancy on a section of land he had entered there (Tr., 96-97, and 151). This story is shown to have been false, not only by subsequent developments, but by the fact that the only land there to which he ever had had any claim had been for more than a year subject to forfeiture for non-payment of interest, a fact which he must have known (Tr., 396). Moreover, he had not lived for nearly three years, as he stated, on the land which he pretended to claim. He bought it in January, 1894 (Tr., 396), and appears to have left Mentone in 1895 (Tr., 217). Section 9, Chapter 99, of the Texas General Laws of 1887, under which this purchase seems to have been made, required the purchaser of land to reside upon it as a home for three consecutive years next succeeding the date of purchase; and it required the payment of one fortieth of the purchase price in cash, and of one fortieth together with 5 per cent. interest on the unpaid balance, on Augsut 1st of each year thereafter. Section 11 provided that if on August 1st of any year the interest should remain unpaid, the land should be

forfeited. By the same section failure to reside upon the land and improve it in good faith was made a ground of forfeiture. Hunter knew that he had not complied with any of these requirements, and that he had no valid claim upon the land. Hunter was at Pecos only afew days, and during that time he and Mrs. Mettler were much together. They went together to Oates's livery stable after Mrs. Mettler's horse (Tr., 148). They went together to Mrs. Manning's house in the country after the Powers horse on the 2nd day of December, stayed at the gate half an hour or an hour before going up to the house, and remained by themselves in an upper room there for two or three hours Tr., 141 and 143). On the morning of the 3rd, after Hunter's team had been hitched up, they were together again near her boarding house (Tr., 157). The long conferences at Mrs. Manning's house were of a most unusual character. On the 3rd of December, Hunter left ostensibly for a trip of ten days into a desert of sand and alkali; but the rations taken by him were inadequate for such a journey (Tr., 113 and 133). Ostensibly he went for the purpose of building a house to be occupied by Mrs. Mettler and himself (Tr., 163); but he took no building material (Tr., 134 and 115). Ostensibly he was going into a wilderness to engage for several days in manual labor; but he wore a nice black overcoat, a black suit, nice calf-skin shoes, a white laundered shirt, with collar, cuffs and necktie, and a blue gingham shirt over the white shirt (Tr., 400). Mrs. Mettler knew of this unsuitable attire, for the description of it comes from her. He left the insurance policies and some other papers in the bank at Pecos, of which he was not a customer (Tr., 150-152); but he did not deposit there any of the money he had withdrawn from the Dallas bank (Tr., 122), and he left in Mrs. Mettler's possession the note which afterwards formed her excuse for calling at the bank (Tr., 153, 371, and 377). This note was the subject of conversa-

tion between them while he was at Pecos (Tr., 401), a fact which she denies in her deposition given in the present suit (Tr., 377). Their discussion of his business affairs was so detailed as to include this old and supposedly worthless note for $180, and he left this note in her possession; yet she testified in her proofs of death, on the trial of the insurance case, and in this suit, that he told her nothing about the $15,000 of insurance in her favor, for which he had paid $97.65 less than a month before (Tr., 400, 418, and 362); and he left these policies, which were her property, in the bank.

4.

HUNTER'S DISAPPEARANCE.

On December 3, 1896, a little before noon (Tr.,114, 149, and 157), with a wagon containing some bedding, cooking utensils, and provisions for himself and team, and drawn by Mrs. Mettler's pony and the borrowed Powers horse, Hunter started professedly for Mentone. He went east on the Barstow road about one and one-half miles until he crossed the bridge over the Pecos River, and then turned north on the Mentone road. At a point about fifteen miles north of the bridge he turned off to the left towards the river, and at a distance of about 100 yards ran up against an impenetrable thicket in a slough. He turned north again, and followed up the edge of this thicket, about parallel with the road, for perhaps half a mile; then he turned to the left again and went through the thicket to the river, where in a little open glade on the bank he pitched his camp (Tr., 99-101). The spot was a lonely one, unfrequented, and invisible from the road, which ran 400 or 500 yards or more to the east of it, and from which it was separated by a dense growth of mesquite brush (Tr., 100, 106, 115, and 125). About three miles south of it was the Rock Crossing of the Pecos, which was a

regular camping place, and a mile or two north of it was another well known camping place on the river (Tr., 99, 114, 125, and 149). From Pecos City to the location of Hunter's camp, by the route he took, was about a half day's drive (Tr., 131 and 149), and it must have been near evening when he got there. When the camp was discovered only one kind of human footprints was found, those of a man wearing an 8½ or 9 shoe, long, slender, and neat looking(Tr., 104-105). On the trial of the insurance case, Mrs. Mettler testified that she recognized these as her brother's tracks (Tr., 416, and 421-422). Therefore whatever was done at the camp by human agency, must have been done by Hunter. When the camp was discovered on the 27th of December, the wagon was found at the edge of the glade, about 175 feet from the river. Near it was a complete set of harness for two horses. Beside it a bed had been made, and in the bed was an imprint as of a man who had slept in it over night (Tr., 101 and 416). A camp fire had been kindled, and a skillet on the ashes indicated that something had been cooked there. A rifle was leaning against the wagon. There were about two bales of alfalfa hay in and beside the wagon; and tied to a bush just out of reach of the hay was the body of Mrs. Mettler's pony, which had died of starvation after beating a half-moon track in the sand in its efforts to reach the hay. There were buckets in which water had been drawn. Leading from the wagon to the river and back at a point where water had been drawn, were Hunter's tracks. Diverging from this line of tracks was another line about 17½ feet long, leading to a point just over the edge of the river bank, and there ending, with nothing to show how the man had gotten away from that spot. Just at this point was a broken shrub, and the last footprint bore signs of slipping. There was no indication as to what had become of the Powers horse (Tr., 101-

104, 105, 122-125, and 132-133). The town of Barstow is located on the Texas and Pacific Railway, seven miles east of Pecos City, and about five miles east of the bridge on which Hunter crossed the Pecos River. There was one passenger train each way daily in December, 1896, the east bound train passing through at about midnight (Tr., 101 and 166). On the morning of December 4th, the next morning after Hunter left Pecos City, the Powers horse was seen near the railway station in Barstow. Tied to its neck was a rope nine or ten feet long, knotted at the loose end. The rope did not appear to have been dragged any considerable distance. The horse stayed there three or four days until Capt. Irvin led him out of town and bled him, and there he died soon afterward (Tr., 166-170, and 126). The Powers horse was a good camp horse, not likely to stray. He had formerly been kept in a pasture just across the river from Hunter's camp, and never had lived at Barstow (Tr., 158-159). There were no indications of his having been tied at the camp, and broken loose (Tr., 105 and 125). An old coat of little value, having in one of its pockets a letter addressed to W. A. Hunter, was found at the camp (Tr., 108, 116 and 122). Hunter's overcoat and valise were not found (Tr., 108 and 123). Mrs. Miller, a disinterested witness, testified that he took his overcoat and valise with him when he started (Tr., 174). On the trial of the insurance case Mrs. Mettler testified that when Hunter started he left his valise and extra wearing apparel with her; and she explained her inability to produce them by saying that she had sold them to a dealer in second-hand goods (Tr., 421). In her deposition in the present suit she denied having sold anything belonging to Hunter (Tr., 376-377). A few weeks later, on January 1, 1897, in Nashville, Tennessee, Hunter made a contract with a nursery company to travel for it through the country districts selling nursery stock at

$40 per month and expenses. He made the contract as W. A. Hunt, of Nashville (Tr., 251-255, 402-404, and 257-260). When he arrived at Nashville is not disclosed by the evidence.

5.

EVENTS AT PECOS CITY.

Hunter left Pecos City on the 3rd of December, to be gone about ten days. Promptly at the expiration of this period, Mrs. Mettler became very uneasy about him, and asked Mrs. Johnson to get her husband to have a search made (Tr.,163, 120 and 415). About the 18th he sent a young man to Mentone to look for Hunter, and a few days later he sent another (Tr., 120-121, and 416). Before the discovery of Hunter's camp she wrote to the family in Ohio about his disappearance (Tr., 290). This nervousness does not harmonize with the coolness and self-possession she displayed on other and more trying occasions (Tr., 134, 163, and 234). Hunter's camp was found by Mr. Gibson on the 27th of December, and on the 29th, Mrs. Mettler visited its site (Tr., 105). Within four days thereafter, she had gone to Mr. Gage, a lawyer and banker, and custodian of Hunter's insurance policies, for advice as to how she should proceed to collect the balance due on Paschal's note to Hunter, and so had made an accidental discovery of the policies (Tr., 153, 362, and 397), which he then produced from his vault. She pretended to Gage, and testified on the trial of the insurance case, that she knew nothing of the existence of the insurance policies until she thus learned of them by chance (Tr., 154, 156, 418-419, and 362). Yet long before this, and before Hunter's visit to Pecos City, she had told Mrs. Johnson of Hunter's having insured his life in her favor (Tr., 162 and 164). This, however, she denies in a negative pregnant sort of way (Tr., 369). On January 2nd, Mrs. Mettler mailed to the insurance

company a registered letter, asking for blanks upon which to make proofs of her brother's death, and of her claim under the three policies, mentioning their numbers (Tr., 397 and 138). Yet on the next day she told Mrs. Johnson that she did not know in what company her brother's life was insured, or where the policies were (Tr., 162-163, and 126-127). The matter of insuring Hunter's life had been talked of between them as early as January, 1896 (Tr., 400 and 154), and during his visit to Pecos they had conferred long and closely. It is impossible to believe that she obtained her first knowledge of the policies from Gage; and if she did not, the elaborately contrived scheme of accidental discovery is almost conclusive evidence of her complicity in the fraud.

Upon receipt of Mrs. Mettler's notice of Hunter's death, the insurance company instructed R. C. Milliken to go to Pecos City and investigate (Tr., 231). Becoming convinced that the case was one of fraudulent disappearance, he conceived the idea of testing Mrs. Mettler by a bogus telegram. He therefore arranged that a message should be sent him from El Paso at a certain hour, and should be delivered to him at Mrs. Mettler's boarding house. In pursuance of this arrangement, while talking with her there, the following telegram, dated El Paso, Texas, and regular in every particular, was delivered to him by the messenger:—"R. C. Milliken, Pecos, Texas. Have got your man. Will reach Pecos on to-night's train with him. Have sheriff meet us at train. J. J. Good." He paid for the telegram, read it, and handed it to Mrs. Mettler. She read it, kept her eyes fixed upon it for several minutes, and then said: "Thank God, my brother is still alive." Milliken told her to give him the policies, and she said she would when her brother came. Milliken testifies that she exhibited no alarm or surprise, but appeared just as before (Tr., 233-234). We have followed Milliken's account

of this transaction. Mrs. Mettler's account differs from his in detail, but not in the important circumstance that she entirely disbelieved his claim, and retained her self-possession (Tr., 363). The experiment had failed utterly, and Milliken had subjected himself to the charge, used with great effect all through the subsequent litigation, of trying to scare a poor widow into an admission of guilt by means of a false telegram. The test was indeed a harsh one, justified only, if at all, by Milliken's conviction that it was necessary to fight the devil with fire. It might well have been expected to shatter the nerves of even so cool and brainy a woman as Mrs. Mettler. Probably it would have done so but for one circumstance; —the telegram came from the west, from El Paso, while Hunter was then far in the east at Nashville, and she knew it. Her deposition does not contain an explicit denial that she knew he was alive and knew where he was. Milliken reported to the company that Hunter was not dead. The company refused to pay, and in due course of time Mrs. Mettler brought suit on the policies.

6.

HUNTER'S LIFE AFTER HIS DISAPPEARANCE.

Within less than a month after he left Pecos City, Hunter was at Nashville, Tennessee, claiming to be a resident of that city, and going under the assumed name of W. A. Hunt. Under that name, on January 1, 1897, he contracted with the Cumberland Nurseries to travel and sell nursery stock. He agreed to "stay in the country from Monday morning until Saturday night". For his services, he was to receive his expenses and $40 per month of twenty-six working days. This contract was renewed at $50 per month in 1898, Hunter in the meantime having changed his headquarters to Atlanta, Georgia (Tr., 251-255, 402-404, and 257-260). On January 22,

1897, D. G. Wallace, a book agent at Nashville, who formerly lived at Newark, Ohio, met Hunter in Nashville. Hunter gave him his true name and told him who he was, but told a false story about what he was doing, and then disappeared again (Tr., 306-309, 232, and 272-273). The season for the sale of nursery stock is short, and Hunter seems to have spent only a few weeks at it each year. He became a sewing machine agent, first at Atlanta, Georgia, and then at Brookside, a small mining town near Birmingham, Alabama, where he located in the latter part of 1898 (Tr., 262-263, and 258). He lived at Brookside as a sewing machine agent, under the name of W. A. Hunt, from that time until he was arrested in April, 1903 (Tr., 258 and 262). On April 27, 1903, he was arrested at the instance of R. C. Milliken, who describes the occurrence thus:

"I saw him on the 27th of April, 1903 (1902 in the record by mistake), sitting in a barber chair in a barber shop in Birmingham, Alabama. I waited at the door until he got his hair trimmed, and as he came up to the door I walked up to him and offered him my hand to shake hands with him and said: 'How are you, Will?' He had both hands full. He set down one of his bundles or grips, and shook hands with me. He didn't say anything for a minute. He said he didn't know me. I remarked: 'Don't you know Johnson, who used to live at Childress?' and then he said: 'Johnson, Johnson, Johnson,' and threw his head down. I told him I was Johnson, the former district attorney, and lived at Childress; and when I asked him again, he said he didn't know me. I then remarked to him, I said: 'Don't you remember when I was district attorney, and you were in the district clerk's office at Quanah?' I said: 'You were in the district clerk's office at Quanah?' and he said: 'Yes.' That is the only admission I could get out of him during my conversation with him as to his whereabouts. I asked him where he had been, and he said he had just been around everywhere, he didn't state anything definite. I asked him where he was living, and he

didn't answer that. I got no admission that his name was Hunter or Hunt or anything else. I didn't know him, I didn't know he was anywhere in the country until I saw him that time in the barber chair. I recognized him from the photographs that I had seen which purported to be his. He told me he had to go and catch his train, and I told him that the first train he could get was to go to Texas; and he asked me what for; and I told him for swindling that insurance company. Then he asked me to go around—just go around where we could have a private talk; and I took him in the back of the barber shop; and he asked me if we couldn't go up in a room and talk; and I told him that was private enough. We had a conversation there in the barber shop with some eight or ten white barbers; and in the meantime I had one of the barbers to telephone the sheriff's office to come down and apprehend an insurance swindler; and I held him there until two deputies from the sheriff's office came down; and then I swore out a warrant against him" (Tr., 234-235).

Under the name of W. A. Hunt, Hunter applied for a writ of habeas corpus, denied that he was the identical person who committed the crime charged against him, appealed to the Supreme Court of Alabama from the judgment of the lower court refusing the writ, and so lay in jail in Birmingham for about seven months while resisting extradition to Texas (Tr., 235, 405-413, 222, and 181). Immediately after his arrest, A. J. Brown and H. B. Taylor went from Dallas to Birmingham to identify him. On April 29th they saw and recognized him, and he recognized both of them (Tr., 181 and 222). The sheriff brought him to Dallas about November 25, 1903 (Tr., 222), at which time he was again identified by Brown and by John H. Stuart, whom he recognized (Tr., 218). Stuart was one of the persons named by him as references in his application for the insurance (Tr., 394). In April, 1904, he was tried for swindling the insurance company, and sentenced to confinement in the penitentiary for five years; but the Court of Criminal

Appeals reversed the judgment on the ground that the Texas statute against swindling was not broad enough to cover such a case (Hunter alias Hunt v. State, 81 S. W. 730, and Tr., 93). During the trial he was seen and recognized by numerous persons who had known him before his disappearance; and he recognized them in turn (Tr., 107, 120, and 152). Up to the time of Hunter's disappearance, he had maintained a regular and active correspondence with the home-folks in Ohio. Immediately upon his disappearance this correspondence ceased entirely and permanently (Tr., 289, 290, 296, 303 and 315).

7.

METTLER v. FIDELITY MUTUAL.

About December, 1897, Mrs. Mettler filed her suit against the insurance company in the state court at Dallas to recover on the three policies, and the company removed the case to the Circuit Court of the United States for the Northern District of Texas (Tr., 345-346), where it was tried at the May term of 1900. It resulted in a judgment in her favor for the face of the policies, $15,000, and $2,250 interest, and $1,800 damages, and $2,500 attorneys' fees (the last two items being the penalty assessed against the company under a Texas statute for its failure to pay her claim promptly), making in all, $21,550. The company sued out a writ of error to this court, where the judgment was affirmed May 5, 1902, the decision being reported at 185 U. S. 308. In her petition, Mrs. Mettler alleged that "William A. Hunter met his death on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27, 1897, and his body never

being recovered" (Tr. 12). The Company pleaded a general derial (Tr., 17-18), and the issue thus presented was the main subject of litigation. To maintain her position, Mrs. Mettler proved by several witnesses, of whom she herself and J. B. Gibson were the most important, the manner in which, and the ostensible errand upon which, Hunter left Pecos City on December 3, 1896; the efforts made by herself to find him when he had overstayed his time; the discovery of his camp on December 27th; in full detail the appearance of the camp and its surroundings when found; the dangerous character of the Pecos River; Hunter's unwonted absence and silence, then covering a period of three and one-half years; her accidental discovery of the policies; and the family reputation that Hunter was drowned at the time and place alleged. The company proved many circumstances tending to show that Hunter did not drown as averred, and introduced the testimony of two witnesses who claimed to have seen him (Tr., 413-491, and 183-184). The evidence convinced the jury and the judge that Hunter did in fact drown as claimed by Mrs. Mettler; and this court held it to be sufficient. We alwayshave thought that the jury was not fairly subject to the criticism which has been heaped upon it for reaching the conclusion that it did. We cannot summarize the evidence in any way better than by quoting the resume given of it by Chief Justice Fuller in these words: "The question of Hunter's death was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence. The evidence tended to show that he was last seen alive on December 3d, when he parted from his sister and started for Mentone, with the intention of returning in a few days. He did not arrive nor return, but disappeared. He camped on the banks of the Pecos River, and the abandoned wagon, harness and gun, the starved horse, the ashes of the fire,

the used cooking utensils, the fragments of food, the bed with its imprint of the sleeper, bore testimony that he cooked, ate, and slept there, and that he went no farther. The footprints to the river's brink,going but not returning, the water buckets, the mark of slipping, the fractured root, the flowing stream,—indicated what might have happened; and the fact that he was not seen nor heard from thereafter, although his relations with his amily were intimate and cordial, and he had always kept up a correspondence with them, so that one or more of them would have been likely to hear from him unless his life had abruptly terminated, or its habitual course been suddenly changed, rendered the inference of fatal accident reasonable" (195 U. S. 316). The evidence was sufficient, and the witnesses in the main testified truly as to what they had seen. But what the witnesses saw was itself from center to circumference a mass of falsehood. Every evidential fact was manufactured; and manufactured for no other purpose than that it should be observed by some innocent witness and communicated first to the insurance company, and if it should not be deceived, then to the court. Even the family reputation that Hunter was drowned had for its sole basis the circumstances of his disappearance as detailed to the family by Mrs. Mettler, and the sudden and permanent cessation of his correspondence (Tr., 290, 296, 303-304, 315, and 319-320). This is a fraud of the most insidious kind, beside which perjury is the mere blundering of a fool.

8.

THE ATTITUDE OF THE HUNTER FAMILY.

This family is a large one, and most of its members still live in Licking County, Ohio. Hunter and Mrs. Mettler came to Texas about 1886, and thereafter maintained a regular correspondence with their father and brothers and sisters in Ohio. Hunter's

correspondence ceased with his disappearance in December, 1896, and never has been resumed. After Hunter had been gone some time, Mrs. Mettler wrote home of his disappearance and of his continued absence, and after the camp was found she described it (Tr., 290 and 303). In January, 1897, about six weeks after Hunter's disappearance, one Ab Landis of Philadelphia visited the family, told it of the insurance on Hunter's life, and obtained a description of him. This was the first the family knew about the insurance (Tr., 293, 300 and 316). On January 22, 1897, D. G. Wallace, a former resident of Licking County, saw Hunter in Nashville, Tenn. (Tr., 307-309). Having seen in the Newark Advocate, which was sent to him regularly, an item published January 8, 1897, giving an account of Hunter's supposed drowning, he wrote to that paper, stating that he had seen Hunter in Nashville (Tr.,309, 324 and 327). On January 29, 1897, the Advocate published an article based on Wallace's letter, stating that Hunter was alive (Tr., 323 and 327). A copy of the paper containing this article was mailed by the editor to a member of the Hunter family (Tr., 327). F. P. Housholder, a brother-in-law of Hunter, wrote to Wallace for information; and on February 2, 1897, Wallace replied stating the circumstances of the meeting, and giving a description of Hunter, which was accurate so far as it went (Tr., 283-285). Housholder communicated to the other members of the family the fact of his having received this letter (Tr., 284), and Mrs. Mettler also was informed of it (Tr., 298-299). Hunter's father testifies that when he received the copy of the Advocate, he wrote to Wallace but got no reply (Tr., 298). Wallace testifies that he did not receive the letter (Tr., 309). Housholder did not reply to Wallace's letter (Tr., 309 and 284); and so far as known no member of the family ever took any other steps to ascertain whether it was a fact that Hunter was

alive and in Nashville in January, 1897 (Tr., 286, 293 298, 302, 309, 316 and 321). They "took it for granted" that he was dead (Tr., 320), and continued very persistently so to do. Strangest of all, Mrs. Mettler, who was then engaged in prosecuting her claim against the insurance company, based upon the theory that Hunter was dead, received from the family in Ohio a newspaper clipping showing that Wallace had seen her brother in Nashville, and made no effort whatever to learn whether it was true that he was alive and in Nashville (Tr., 378-379). When Hunter's arrest was reported, a half uncle wrote to some one in Birmingham, and in reply got a description of the party arrested, but it was not considered a good description (Tr., 318, 321 and 332). Aside from this, so far as known, no member of the family made any effort to learn whether it was really the lost son and brother who was in jail in Birmingham (Tr., 332, 321 and 318). As to most members of the family this evidence did not even create a suspicion that Hunter was alive, and some of them do not know it yet (Tr., 286-287, 299 and 294). There was an extreme lack of curiosity on the part of this family. Knowing that Mrs. Mettler had collected many thousands of dollars from the insurance company on the theory that Hunter was dead, most of them had no conversation with her about his arrest or about the steps taken by her to learn whether he was alive; and except her father those who did talk with her cannot remember what was said (Tr., 286, 294-295, 297 and 305). This apathy was not due to any want of intellectual acuteness. It never has been our lot to examine witnesses sharper, cooler, or more alive to their own interests. There are two exceptions to the general rule. One witness, Luella M. Butcher, was found momentarily off her guard, and the following colloquy ensued: "Q. When did you first suspect that your brother, William A. Hunter, was still living after his disappearance? A. I did not

believe that he was living until it was proven. Q. My question was, when you first suspected it, not when you first believed it. A. I don't know. Q. Did you have such a suspicion at any time before his arrest? A. Not until along towards the last did I think of such a thing. Q. About when was it that you first thought of it, — about how long before his arrest? A. I didn't suspicion it, but a doubt sometimes from what people would say, would sometimes, a little bit, come into my mind, but I did not suspicion it, really. Q. What was it that first caused these doubts to come into your mind, what fact or statement? A. Newspaper reports. Q. Reports in what newspapers? A. The first was in the Mt. Vernon Banner, copied from the Newark Advocate, I think. Q. What did that say that caused you to have doubts? A. I don't remember" (Tr., 291). The other exception was that Dr. F. J. Hunter, a brother, who did not share in the general family belief that Hunter was dead, and whose deposition was not taken by Mrs. Mettler in the insurance case (Tr., 331). In a letter written by him to J. B. Gibson December 20, 1902, more than four months before Hunter's arrest, he said: "I never believed him dead until a year or so ago; then I knew something was crooked somewhere; and I know now where." Asked to explain what he meant by this, he said it referred to Mrs. Mettler's appropriation of Hunter's property (Tr., 331-332).

9.

MRS. SMYTHE'S (METTLER'S) CONDUCT.

After Hunter's disappearance Mrs. Mettler lived for a time at Pecos City, then at Dallas (Tr., 228), and after a year or two she returned to Licking County, Ohio. There she lived as a member of her father's family until she married James N. Smythe about the last of March, 1903 (Tr., 297-298, 302 and 317).

When Wallace wrote to Housholder in February, 1897, that he had seen Hunter in Nashville, the fact that such a letter had been received was communicated to her, and a clipping from the newspaper was sent to her (Tr., 298-299 and 378-379); but she took no steps whatever to ascertain whether it was true that Hunter was alive and in Nashville (Tr., 379). While she was living in Dallas she received her mail through the general delivery at the post office, and she instructed the clerk in charge not to let any person except one certain woman have her mail even on a written order (Tr., 228). When Hunter disappeared Mrs. Mettler took possession of his papers that were left in the bank, and also of his note against Paschal, which she collected. She never said anything to the other members of the family about settling his estate, and giving to them their share of the property (Tr., 292, 297, 304, 315, 320 and 330). In fact she had very little to say at home about Hunter and his affairs (Tr., 332). When this court had affirmed her judgment, she wrote to William H. Clark, her attorney, congratulating him, and telling him what to do with her money. In that letter she said: "Wonder how old Millican feels—you know my contempt for the man, so you can judge how I rejoice over his defeat. Wouldn't he look sour now. *If there was or is anything more he can do, he will do it*" (Tr., 199). Mrs. Mettler was altogether too shrewd a woman not to know that the battle was over, and that there was nothing more that Milliken could do, *unless there were some fraud yet undiscovered which his continued vigilance might unearth.* To us this passage of her letter seems significant. On June 23, 1903, Clark sent her $11,160.50 as her part of the proceeds of her judgment against the insurance company (Tr., 350). On July 2nd, she deposited this money in the bank of A. J. Wilson, at Utica, Ohio. Later on, she made another deposit of $145.67 there. On various dates prior to

April, 1903, she had drawn against this fund thirteen checks, aggregating $4172, leaving in the bank a balance of $7134.17 (Tr., 275-279). Hunter was arrested April 27, 1903 (Tr., 234), and identified April 29th by Brown and Taylor (Tr., 181, 222 and 273). So far as known, Mrs. Mettler took no steps to ascertain whether the man arrested was really her brother (Tr., 305, 318, 321 and 332). She told her father that she did not believe he was (Tr., 297), and in her answer filed in this suit March 7, 1904, she said the same thing (Tr., 46). At the time of Hunter's arrest, Mrs. Mettler was living in Newark, Ohio (Tr., 299), and keeping her money at Wilson's bank in Utica. On April 29th, she was at Homer, which is four miles from Utica, and somewhere near fifteen miles from Newark. On the afternoon of April 29th, there was published in the Newark Evening Tribune an article announcing the arrest of Hunter, and giving some account of the matter (Tr., 367-369). This paper must have been sent to Mrs. Mettler from Newark to Homer that evening, as she testifies that from it she received her first information of Hunter's arrest (Tr., 367), and on the morning of the next day, the 30th, she went in a buggy from Homer to Utica, and there withdrew from Wilson's bank, in cash, her entire balance of $7134.17 (Tr., 381 and 276). This she did because of what she had seen in the paper (Tr., 383). If she was an honest woman with a clear conscience, why should she do such a thing as this? When Hunter disappeared, she was very prompt to conclude that he was dead. When Wallace reported having seen him in Nashville, and she was engaged in trying to convince the insurance company that he was dead, she did not see any reason for doubting that he had been drowned, and did not consider it worth while even to investigate the report. When Milliken showed her a telegram, stating that Hunter had been arrested in El Paso, when in fact he was fifteen hundred miles from there, in Nash-

ville. her equanimity was not disturbed. and she continued steadfastly to assert that he had perished in the waters and quicksands of the Pecos River. All of these things happened within a few weeks after his disappearance. But when he had been gone for more than six years, and when the courts had approved her claim that he was drowned, and when the insurance company had been compelled to pay out more than $24,000 on that theory, a newspaper report came that he was alive and had been arrested in Birmingham, Alabama. Forthwith, and without waiting to investigate, she acted on the assumption that he was alive, that he had been arrested, and that trouble for her was coming. This was a strange reversal of her attitude. But it is explainable. Hunter had been living for years in or near Birmingham under the name of W. A. Hunt. If she knew it, she was prepared to believe a report coming from that place of the apprehension of William A. Hunter, alias William A. Hunt, charged with swindling the insurance company in this matter. Nowhere in her deposition is there an express denial that she knew all the time that he was alive, and where he was. Nearly a year before, she had written to Clark that if there was anything more that Milliken could do he would do it. Did she realize then that Hunter was alive, and that if the fraud were discovered, there would be new rights which the company could enforce? Was this in her mind all the time from the date of that letter to the date of Hunter's arrest? Was it this knowledge, and a previous study of the probable course of events if Hunter were found, that made her ready to act instantly upon receipt of the tidings of his arrest? Certainly it does appear so. On April 30, 1903, Mrs Mettler, then become Mrs. Smythe, withdrew from Wilson's bank, in cash, the sum of $7134.17 (Tr., 276). A day or two after that she was questioned very particularly by the tax assessor, her attention being called especially

to the money she was supposed to have received from the insurance company. She swore that she had no moneys or other personal property (Tr., 312 and 326). This however she denies in part (Tr., 384-385). Of course it may be that she was swearing falsely for the purpose of evading taxation. If so, the fact is not calculated to lend credit to any statement made by her at any time, whether made by word or by act. It may be, however, that she considered herself as simply a trustee for Hunter, that to avoid suspicion she had become his banker for a time until there should be opportunity to turn the money over to him without the appearance of evil. What became of this large sum of money is not shown by the evidence. In her deposition she repeatedly refused to tell, *and finally based her refusal upon the ground that her answers might tend to incriminate her* (Tr., 381-386). The bill charges upon information and belief that Mrs. Mettler paid over to Hunter a large portion of the money received by her. The case was put at issue as to all the defendants on July 4, 1904. The time within which testimony might be taken expired October 4, 1904. Mrs. Smythe's deposition was not taken until January 23, 1905, and was filed by special agreement January 30, 1905, the date on which the case was set for trial (Tr., 387). Hunter's deposition was not taken at all; though Mrs. Smythe was represented in this suit by the same attorneys at Dallas and at Birmingham who had defended Hunter in his criminal trial, and who of course knew whether his testimony would be of value to their present client (Tr., 334, 257 and 261). No one but Hunter and Mrs. Smythe could tell whether she paid him any of this money. He was not asked to tell, and she refused to tell. Up to the time of Hunter's disappearance at the age of thirty-three he had accumulated practically nothing. After his disappearance, as a peddler of fruit trees, he made $40 to $50 per month. What he made as ped-

dler of sewing machines is not known; but somewhere he got the funds necessary to conduct a long and expensive fight against the charge of swindling, including the employment of able counsel in both Dallas and Birmingham, and repeated trips from Birmingham to Dallas by himself, his counsel, and other friends (Tr., 334-335).

MRS. SMYTHE'S DEPOSITION.

Mrs. Smythe repeats the story told on the trial of the insurance case about her accidental discovery of the insurance policies. She also says that there was no conversation or understanding at any time between herself and her brother on the subject of his having his life insured (Tr., 362 and 364). In this she contradicts her own statement, made in the supplementary proofs of death, that Hunter first mentioned to her the subject of insuring his life in January, 1897, in Mentone, Texas (Tr., 400). She tells of Milliken's supposed ill-treatment of her, and of the telegram incident (Tr., 363). Her version of this affair differs from his (Tr., 233-234); but equally with his it shows that she did not lose her self-possession or give credence to the telegram for a single moment. She goes over one by one the checks drawn on Wilson's bank before April 30, 1903, telling in whose favor and for what purpose they were drawn, but as to three checks in favor of her brother, C. E. Hunter, aggregating $275, and one check for $540 in her own favor, she fails to tell why they were made (Tr., 366); but perhaps this was unintentional. She says she first learned of Hunter's arrest through an article published in the Newark Tribune, April 29, 1903, and on account of that article withdrew her money from Wilson's bank in Utica the next morning. The Tribune is an evening paper, as is shown by the article itself, and by the copy of the paper attached to the deposition but not inserted in the print-

ed record. She was then in the country, some four or five miles from Utica, and some fifteen miles from Newark (Tr. 379, 288, 367, 381 and 383). It was somewhat remarkable that this paper should be sent out to her in the country on the evening of its publication, and very remarkable that she should act so promptly upon the information contained in it. In her deposition she says her brother had two little valises with him when he came to Pecos, and left them both with her, and that in one of them, in a pocket-book, she found the Paschal note (Tr., 376-377). In her evidence in the insurance case she mentioned only one valise (Tr., 485). Mrs. Miller, a wholly disinterested witness, whose testimony was obtained with difficulty, as her deposition shows, says that Hunter took his valise with him when he started to Mentone (Tr., 173 and 174). Mrs Smythe says she never sold any trunk, valise, clothing, or anything else belonging to her brother (Tr., 377). Quite an important feature of her evidence in the insurance case was her statement that she had sold his valise and clothing to some unknown second-hand dealer in Ft. Worth (Tr., 421), and that therefore they could not be produced in that case to contradict Mrs. Miller's testimony. She says she never knew anything about the Paschal note until she found it in the old pocket-book in the valise, that she had not heard of it before, that her brother had not mentioned it, and that she did not know of its existence (Tr., 377). In her supplementary proofs of death she said that she had known of the note ever since 1891 or 1892, and that when Hunter was in Pecos she asked him whether it had been paid, and he said that it had not, and that he had placed it in the bank at Gainesville for collection (Tr., 401). In her evidence in the insurance case, she undertook to give the contents of the valise, and did not mention either the note or the pocket-book (Tr., 421 and 422). She at first denies in the most

explicit terms that ever at any time after April 26, 1903, which was the day before Hunter's arrest, she received either directly or indirectly any communication either written or oral from her brother, William A. Hunter, or from any other person claiming to write or speak in his behalf (Tr., 379). Later she admits that "a lawyer sent a picture purporting to be one of his" (Tr., 383). Still later when asked whether she had had any communication with her brother since his arrest, she declines to answer, and in explanation of her refusal says that *her answer might tend to incriminate her* (Tr., 386). She contradicts in a very evasive negative-pregnant sort of way, the testimony of Mrs. Johnson, confirmed by that of her husband and the post-master, Sapp, regarding her statements to Mrs. Johnson about her brother's insurance (Tr., 369). She says she got her papers from W. H. Clark on her return from her trip to the City of Mexico (Tr., 370-371). In this she contradicts the itinerary of that journey given by her sister Clara (Tr., 317). Her only denial of a division of the spoils with her brother consists of her answers to grossly leading questions as follows: "Q. I will ask you whether William A. Hunter, your brother, prior to April 29, 1903, got any portion of that money which was received from William H. Clark by you? A. Not any at all. Q. Or whether you had promised him any, or agreed to pay him any part of it? A. I had never promised him any, or agreed to pay him any.—Q. Has your brother, to your knowledge, received any benefit whatever from the money which you had received from the suit in Dallas against the plaintiff? A. None that I know of. Q. *Had* you given him any property or anything of value for or on account of that money? A. Nothing whatever. Q. Or, *had* you directed any one else to do so? A. No, sir; I *hadn't*. Q. Did your attorneys pay him any part of the money before it came into your hands, that you have any

knowledge of? A. No, sir; not that I know of. Q. Or, was any such thing done by your attorney? A. No, sir; it wasn't done by my attorney.' (Tr., 367 and 371-372). These questions and answers are carefully framed, incomplete and evasive. They are far from being a statement that she never at any time, directly or indirectly, turned over to Hunter, or to any one else for his benefit, in any form, any portion of the fruits of the insurance policies; and when on cross examination she is asked for the particulars that would require direct and positive statements as to what she did with the money, over and over again she refuses to answer *on the ground that her answers might tend to incriminate her* (Tr., 381, 382, 384 and 386). She denies that she made oath in May, 1903, before the tax-assessor that she had no moneys or other personal property (Tr., 384-385). In this she is contradicted by the tax-assessor (Tr., 311-313), who is confirmed by the county auditor (Tr., 325-326).

11.

MISSING TESTIMONY.

In her answer, Mrs. Smythe says: "These defendants aver that they have no idea when the said Wm. A. Hunter left said camp, or the circumstances under which he left, or the reason which influenced him to leave the camp" (Tr., 82). She does not so testify. In her answer she admits the finding of the Powers horse at Barstow and says: "But how the said horse came to be there these defendants are not advised, and have no information or belief" (Tr., 82). She does not testify to her lack of knowledge. In her answer she alleges: "These defendants have no knowledge of where said William A. Hunter went after leaving the camp; they have no knowledge of the fact that he quitted the state of Texas and assumed a fictitious name, and ever thereafter concealed himself, so that he should not be found by the

plaintiff. These defendants deny that the said Wm. A. Hunter ever did attempt to conceal his person from the plaintiffs" (Tr., 82). Yet, strange to say, her deposition contains no assertion of her ignorance of Hunter's whereabouts, but leaves without denial the plaintiff's allegation that she did have such knowledge and concealed the same, supported as this allegation is by an abundance of circumstantial evidence. The plaintiff's bill avers as follows: "The inability of the defendant company to procure convincing evidence of the fact that Hunter had not been drowned, but was still living, was due solely to the studious care with which said fact was concealed by him, and, as the plaintiff verily believes, by her as well. The plaintiff has much reason to believe, and verily it does believe, that the defendant, Jennie M. Smythe, knew at all times that her brother, the said William A. Hunter, was not dead; and that she knew where he was and maintained a regular correspondence with him at all times during the pendency of said litigation; and that she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff; and that both by deliberate concealment and by direct perjury she withheld from the court the true facts as the same were known to her, and prevented the plaintiff from procuring evidence to establish its defense" (Tr., 5-6). If there is in Mrs. Smythe's deposition an explicit denial of any of these important allegations of the bill, we have overlooked it. It is incredible that such omissions should be inadvertent. Especially is this so in view of the slowness with wnich she went to the witness stand, and in view of her refusal to answer so many searching questions upon the ground that her answers might incriminate her. There is another thing which is significantly absent from both the pleadings and the testimony. It nowhere appears that when Hunter

was proven guilty of fraud, Mrs. Smythe offered to restore to the insurance company so much as she yet had in her possession of its money which she had received as the beneficiary of that fraud. Had she been an honest woman, deceived by the circumstances indicating Hunter's death and so prosecuting and collecting her claim in good faith, her impulses would have driven her irresistably to the restitution of all that she yet had of the money out of which the insurance company had been defrauded in her behalf.

12.

THE INSURANCE COMPANY'S DILIGENCE.

Promptly on receiving notice of Hunter's death, the insurance company sent R. C. Milliken to Pecos to investigate, and Ab. Landis went to Homer to get a description of Hunter. Milliken stayed at Pecos about two weeks, and reported that Hunter had not been drowned, and that it was a case of fraud. From that time on, until the trial of the case in May, 1900, he was engaged in the matter, visiting many places in the course of his investigations. At Nashville, Tennessee, he examined the registers of all the principal hotels and boarding houses, trying to find Hunter's name; but, very naturally, he failed (Tr., 232). The company's agent at Nashville and a firm of lawyers there were requested to investigate the clew afforded by Wallace's report that he had seen Hunter, in addition to the work of inspectors sent there (Tr., 272 and 273). The company followed up every clew, and never ceased to prosecute the search until Hunter was found. It expended in the search about $5,000 aside from the salaries of those so employed, and these would increase the total expenditure to about $10,000. The first information the company had that Hunter had changed his name and assumed that of Hunt was when it heard of his arrest on April 27,

1903. Up to that time it had not been able to find any evidence not used on the trial of the insurance case (Tr., 272-273).

13.

Conclusion.

It seems to us that the circumstances of this case, as shown by the record, fully justify the finding of the learned district judge, hereinbefore reported as follows:

"I find from the evidence submitted in this case that the assured, William A. Hunter, is not dead, but living; and further, that the defendant, Jennie M. Smythe, and her brother, William A. Hunter, the assured, conspired together from the beginning, and concocted together the scheme to defraud the insurance company; that the inability of the insurance company to show on the trial of the case at law that Hunter had not met his death by drowning was due solely to the actions of himself and his sister Mrs. Smythe; that they concealed the fact that he was living, studiously, carefully, and persistently. I also find that diligence was used by the insurance company in attempting to ascertain and prove the fact that Hunter was living, on the trial of the insurance case, and that it was prevented from so doing by reason of the fraudulent conspiracy and acts of Jennie M. Smythe and her brother, the assured. —— The fact that Hunter was alive, was one of which the insurance company might have availed itself in the action at law, but it was prevented from so doing by the fraud of the defendant, Jennie M. Smythe, and her brother, the assured. There was no negligence on the part of the insurance company or its agents, which would preclude an appeal to a court of chancery. A great fraud was practiced upon the court, and an unconscientious advantage taken of the company without any fault or negligence on its part."

It remains to inquire what remedies a court of equity can offer to one against whom such a wrong has been perpetrated.

JURISDICTION OF THE COURTS.

1.

The Particular Courts.

The plaintiff was a citizen of Pennsylvania at the time of instituting the suit. The defendants Clark and Culberson were citizens of Texas and residents of Dallas County, which is in the Dallas division of the Northern District of Texas. The defendant Spoonts was a citizen of Texas, and a resident of Tarrant County, which is in the Ft. Worth division of the Northern District of Texas. The defendant Phillips Investment Company was a citizen of Missouri, and the defendants Jennie M. and James N. Smythe were citizens of Ohio. The judgment whose use by the defendants the plaintiff sought to restrain, was rendered in an action at law in the circuit court for the Dallas division of the Northern District of Texas, and the bill was filed in that court (Tr., 1-2).

Together with its bill the defendant filed a verified motion for the allowance of substituted service upon the defendants Jennie M. Smythe, James N. Smythe, and Phillips Investment Company, which motion was granted by the district judge in chambers (Tr., 22-25). The defendants Jennie M. and James N. Smythe filed a plea of their privilege to be sued in the Southern District of Ohio, but did not complain of any lack of due service upon them. They are not parties to this appeal. All the defendants who are parties to this appeal entered their general appearance, and filed demurrers and answers without objecting to the jurisdiction of the particular court in which the suit was brought (Tr., 25-26).

While for most purposes a bill in equity to restrain the use of a judgment at law is deemed a separate proceeding in personam, it is held that such a bill is so far ancillary to the original cause that the federal court upon whose law side the judgment was

rendered has upon its equity side jurisdiction of the bill without regard to the citizenship of the parties, and that it may summon them before it by substituted service.

> Logan v. Patrick, 5 Cranch 288; Dunn v. Clarke, 8 Peters 1; Freeman v. Howe, 24 Howard 450; Mil. and Minn. R. Co. v. Soutter, 2 Wallace 609; Jones v. Andrews, 10 Wallace 327; Krippendorf v. Hyde, 110 U. S. 276; Pac. R. Co. of Mo. v. Mo. Pac. R. Co., 111 U. S. 505; Webb v. Barnwall, 116 U. S. 193; Dunlap v. Stetson, 4 Mason 349; Hatch v. Dorr, 4 McLean 112; Williams v. Byrne, Hempstead 472; In re Sabin, 21 Fed. Cas. No. 12,195; Doe v. Johnston, 2 McLean 323; The Cortes Co. v. Thannhauser, 9 Fed. 226; McDonald v. Seligman, 81 Fed. 753; 1 Bates on Fed. Equity Procedure, §§ 46 and 157.

The application of this principle is not confined to cases in which the parties to the suit in equity are identical with those to the action at law. It is sufficient that all parties to the chancery suit be privy to the judgment at law.

> Dunn v. Clarke, 8 Peters 1; Freeman v. Howe, 24 Howard 450; McDonald v. Seligman, 81 Fed. 753.

The bill shows the sum of money received by each defendant, and under what title he received it. The prayer is for an injunction against each and all of the defendants, and for a decree requiring each to return with interest the amount by him severally received. One of the grounds of the original demurrer of all the defendants other than the Smythes is: "because it does not appear that they or either of them are necessary or proper parties to said bill of complaint." In a separate demurrer filed by Phillips Investment Company, one of the grounds of objection

is that the bill is multifarious in that there is no privity between it and the Smythes. The amended demurrer filed by all except the Smythes again emphasizes the difference between the position of the Smythes and that of the demurrants. The defendants who are parties to this appeal have all the defenses which the Smythes have, and others besides. They ask for no relief against one another or against the Smythes, nor do the Smythes ask any against them. The decree gives to the plaintiff all it asks against the Smythes, and nothing against the other defendants. All through the litigation, from bill to decree, the position of the Smythes has been kept wholly separate from that of the other defendants. Under these circumstances the decree is so far separable as to permit the plaintiff to appeal from that portion thereof which is adverse to it without bringing into this court the Smythes, against whom it has obtained all the relief sought.

Cox v. United States, 6 Peters 172; Forgay v. Conrad, 6 Howard 201; Brewster v. Wakefield, 22 Howard 118; Germain v. Mason, 12 Wallace 259; Simpson v. Greeley, 20 Wallace 152; Milner v. Meek, 95 U. S. 252; Basket v. Hassell, 107 U. S. 602; Hanrick v. Patrick, 119 U. S. 156; City Nat. Bank v. Hunter, 129 U. S. 557; Gilfillan v. McKee, 159 U. S. 303; Mercantile Trust Co. v. Adams Express Co., 7 C. C. A. 3; Grand Island etc. R. Co. v. Sweeney, 43 C. C. A. 255; Gray v. Havemeyer, 3 C. C. A. 497.

All the defendants made parties to this appeal questioned the jurisdiction of the circuit court to entertain the suit on the ground that such jurisdiction was denied to it by the Seventh Amendment to the Constitution of the United States, reading as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a

jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law" (Tr., 26, 51 and 72). The decision of the circuit court was against the defendants and in favor of the plaintiff upon this point.

Section 5 of the act of March 2, 1891, provides for a direct appeal from a circuit court to this court "in any case that involves the construction or application of the Constitution of the United States." The statute does not make it an essential element of the right of direct appeal to this court that the decision of the circuit court upon the constitutional question should have been adverse to the appellant. It is sufficient that the construction or application of the constitution be involved in the case.

> Holder v. Aultman, Miller & Co., 169 U. S. 81; Loeb v. Trustees of Columbia Township, 179 U. S. 472; Field v. Barber Asphalt Paving Co., 194 U. S. 618.

The jurisdiction of this court is not confined to the constitutional question, but extends to the entire case: Field v. Barber Asphalt Paving Co., 194 U. S. 618, and cases there cited.

2.

THE CONSTITUTIONAL QUESTION.

The question to be considered is whether the circuit court and this court are deprived of jurisdiction to entertain the plaintiff's bill by the last clause of the Seventh Amendment to the Constitution of the United States, which reads as follows: "And no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law." The judicial power of the federal government extends "to controversies—between citizens of different states:" Constitution, Art. 3, §2. The original cognizance of the circuit court includes "all suits of a civil nature, at common law or

in equity,—in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value" of $2,000: 25 Stat. at L. 433, §1.

The words "common law" and "equity" as used in the constitution are to be interpreted by reference to the laws of England as they existed at the time of the American revolution. Generally speaking, the jurisdiction in equity of the federal courts is coextensive with that of the English high court of chancery of that period: State of Pennsylvania v. Wheeling etc. Bridge Co., 13 Howard 518; Mississippi Mills v. Cohn, 150 U. S. 202. What sort of reexamination of facts tried by a jury was then "according to the rules of the common law," and so permitted by the seventh amendment, is therefore to a great extent a question of English history.

While Sir Thomas More was lord chancellor of England (1529-1532), in the time of Henry VIII, he granted injunctions against judgments of the common law courts whenever it seemed to him that wrong would result from their refusal to remedy the effect of accident or to prevent secret frauds from being profitable to the parties concerned in them, a practice which had its beginning at a considerably earlier date. The judges having complained of this, he caused a docket to be made of such injunctions, allowed or pending, invited all the judges to dine with him, explained to them the grounds upon which each case proceeded, and drew from them the unanimous admission that they themselves could not have done otherwise. He then proposed to them that if they would grant the necessary relief from the law's rigor, he would issue no more injunctions. Upon their refusal, he is reported to have said: "Forasmuch as yourselves, my lords, drive me to that necessity for awarding out injunctions to relieve the people's injury, you cannot hereafter any more justly blame me:" 2 Campbell's Lives of the Chancellors 34.

About 1589, in the reign of Elizabeth, a barrister was indicted under the statutes of praemunire for having signed a bill in chancery praying for an injunction against a common law judgment. But the case was not brought to trial, and the controversy between the courts rested for a quarter of a century: 2 Campbell's Lives of the Chancellors 342.

In 1616, in the reign of James I, when Lord Ellesmere was chancellor and Lord Coke was chief justice of the king's bench, the quarrel was revived, and fought out to the finish. Coke's contention was that the court of chancery had no right to interfere with an action at law, and that an attempt to reexamine in chancery the final judgment of a law court was criminal under the statutes of praemunire. Accordingly he pronounced judgment in a case in which Ellesmere had granted an injunction to stay proceedings; he discharged on habeas corpus a person whom Ellesmere had committed for breach of an injunction against suing out execution on a judgment; he threatened to disbar any lawyer who should "put his hand to a bill in any English court after a judgment at law;" and together with another judge of the king's bench, he delivered an opinion that the interposition of equity in actions at law was illegal. Finally a case arose in which the plaintiff in an action in the court of king's bench obtained a judgment by decoying the defendant's witness away from court. The defendant applied to the chancellor for relief, and was accorded a decree restraining execution of the judgment. Coke pressed another judge to charge the grand jury to inquire of all such persons as questioned judgments at law by bill or petition in the court of chancery; and himself threatened to commit the grand jury for refusal to indict. Thereupon, Ellesmere submitted to King James the question: "whether upon an apparent matter of equity which the judges of the law by their place and oath cannot meddle with or relieve,

if a judgment be once passed at common law, the subject shall perish, or that the chancery shall relieve him? and, whether there be any statute of praemunire, or other, to restrain this power in the chancellor?" The king referred the question to a committee of eminent lawyers, who reported that the statutes of praemunire did not apply to such a case, that the chancellor's action was sustained by reason and by many precedents running back to the time of Henry VIII, and that he had jurisdiction to examine the judgments of the courts of the common law, and to stay execution thereon, if he should find that they had been obtained by fraud, for which those courts could not afford sufficient remedy. Thereupon an order was entered to the effect that the chancellor had not exceeded his authority. Coke submitted; and ever thereafter the court of chancery exercised without interference or resistance its jurisdiction to restrain the use of fraudulently procured judgments, though in theory its right so to do was sometimes doubted until about the end of the seventeenth century. Long before the American revolution, the question had ceased to be mooted; and Sir William Blackstone, who was a common law judge, and whose Commentaries had a very large sale in America and frequently were cited in the debates on the constitution, declared that Coke "was clearly in the wrong."

3 Blackstone's Commentaries *53; Hallam's Constitutional History of England (Chapter 6) 247; 1 Campbell's Lives of the Chief Justices 332; 2 Campbell's Lives of the Chancellors 362; 3 Pomeroy's Equity Jurisprudence, §1360; 1 Story's Equity Jurisprudence §51; 1 High on Injunctions, §112.

In a pamphlet written by Lord Ellesmere, entitled "The Priviledges and Prerogatives of the High Court of Chancery" and published in 1641 after his death, the chancellor said: "The Common Law hath

alwaies allowed the proceedings in the Chancery, in cases of conscience and equity; and therfore the words (to doe the common law) must not be construed too precisely, as thereby stop all Courts of equity, for it standeth with the common law, as well that equity and conscience bee ministered, where the common law cannot helpe, as that strict justice be ministered according to the common law, when the common law may serve. The Chancery doth not commonly send any Writ or Commandment to the judges, under the great Seale comanding them to stay to do justice, but awardeth injunction to the parties, that seeke to have the advantage of the strictnesse of the common law, against equity and conscience: neverthelesse there be plentiful examples that Writs of *supersedeas*, under the great Seale have beene directed to the judges, in diverse speciall causes, and have in all times (untill of late) beene dutifully obeyed, as in cases of priviledge and to stay their proceedings: *Reges in consulto* and divers others, &c." Upon this theory, it seems, Ellesmere proceeded in his controversy with Coke.

From the foregoing examination it appears that when our constitution was adopted, it had been for a century the thoroughly established and universally admitted "rule of the common law" to submit its verdicts and judgments to reexamination in chancery for fraud practiced in their procurement, and for other causes which need not be specified here. It is impossible to doubt that but for the existence of this acknowledged rule, sometime between 1616 and 1789, such common law judges as Hale, Holt, Hardwicke and Mansfield would have devised, or the parliament would have supplied, some other remedy for the obvious injustice of permitting one to enforce a judgment fraudulently obtained.

The Articles of Confederation adopted in 1778 having proven insufficient for the needs of the United States, they appointed delegates to a federal conven-

tion which should consider the faults in the existing constitution, and devise a remedy therefor. The convention assembled in Philadelphia May 25, 1787, and continued in session nearly four months; when it reported to the congress of the confederation the constitution as it now exists, save for the fifteen amendments. September 28, 1787, the congress resolved that the report be transmitted to each state for [illegible]ion to a convention of delegates chosen by the people thereof. In 1787 and 1788, Delaware, Pennsylvania, New Jersey, Connecticut, Georgia, and Maryland ratified the constitution without suggestion of amendments, and Massachusetts, South Carolina, New Hampshire, Virginia, and New York ratified it with specifications of 9, 4, 12, 20 and 32 amendments which they respectively desired; while North Carolina submitted a declaration of rights and 26 amendments, which it wished to have considered before it should ratify the constitution. At the first session of the congress under the constitution, held in 1789, these 103 proposed amendments, many of which covered common ground, were considered, and from them 12 were prepared, passed and submitted to the states; which ratified all but the first two. Such in outline is the history of the adoption of the constitution and the first 10 amendments. Pending its adoption, the constitution was considered with almost unexampled fullness of debate by the federal convention and the state conventions, and in pamphlets and the newspapers; and much of this contemporary discussion is still extant.

The constitution as reported by the federal convention and submitted to the states, provided for jury trial in criminal cases, but was silent as to the mode of trial in civil cases. It was provided that in all cases the supreme court's appellate jurisdiction should extend to both law and fact with such exceptions and under such regulations as the congress

should make: Article 3, §2. These provisions were very unsatisfactory to the people, chiefly for two reasons: (1) they wished an explicit guaranty of the right of trial by jury in all cases in which such trial had been usual; and (2) they did not wish the verdicts of juries in such cases to be subject to revision on appeal.

The first congress of delegates had unanimously resolved on October 14, 1774, "that the respective colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law:" 1 Elliott's Debates 44. All the states had the institution of trial by jury; but they differed widely in the extent to which they employed it, and in none of them were all civil cases so triable. It was the difficulty of harmonizing these divergent systems, and not any desire of innovation, which led the federal convention to frame the judiciary article so broadly and to leave it to the congress to make all needed adjustments.

Madison's Journal, Sept. 12, 1787; 2 Elliott's Debates 114 and 488; 3 idem 68, 468 and 519; 4 idem 144, 260 and 307; Federalist Papers, Essays 81 and 83.

We have examined with care the official journals of the federal convention, Madison's Journal and Yates's Minutes of the debates in that convention, all the amendments proposed by the states, the debates in the various state conventions as compiled by Elliott, the Annals of the First Congress, Gales and Seaton's Journal of the First Session of the Senate, the Federalist Papers, and the histories of Bancroft, McMaster, Schouler, Winsor, Fiske, Von Holst and Thorpe. With all this research, we have not found so much as a single word which indicates that any person whatsoever doubted the propriety of the established jurisdiction of courts of chancery to review

judgments at law for fraud, or supposed that the federal courts would not or should not be vested with that jurisdiction to its fullest extent. But, on the contrary, we find that in the Virginia convention it was suggested that a cause of action might be assigned for purposes of suit to a citizen of another state, and so the defendant be sued away from home, out of reach of his witnesses, and have an unjust judgment rendered against him; and we find that besides other answers to this suggestion the following was made by no less a personage than John Marshall: "It is *possible* in our courts, as they now stand, to obtain a judgment for more than justice. But the court of chancery grants relief. Would it not be so in the federal courts? Would not depositions be taken to prove the payments; and if proved, would not the decision of the court be accordingly?" 3 Elliott's Debates 557.

So far as we have been able to ascertain the spirit of the age, the wish of all parties was that the jurisdiction and procedure of both law and equity courts should remain substantially as they had existed for many years, but some wished a constitutional guaranty of continuance in the ancient ways, while others thought it wiser to leave the details to the congress. The seventh amendment was adopted for the sole purpose of providing the desired constitutional guaranty, and should be construed in the light of its history. It remains to inquire what construction has in fact been placed upon it. But first it is worth noting that most of the state constitutions guarantee the right of trial by jury, and that their variously worded provisions on this subject always are held merely to preserve the right as it existed when the constitution under consideration was adopted: Cooley's Constitutional Limitations 504.

We have made an extended search, but have been unable to find a single case in any court, federal

or state, where the right of a court of equity to re-examine for fraud a judgment or a verdict at law was the matter under consideration, and where it was either decided or stated that courts of the United States sitting in equity had not that power.

It has been held that the first clause of the seventh amendment, "correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law."

Shields v. Thomas, 18 Howard 253; Waring v. Clarke, 5 Howard 441; Barton v. Barbour, 104 U. S. 126.

It was held under the old law concerning removal of causes that the second clause of the seventh amendment did not prevent the removal of a case to the federal court, and its trial there, after it had been tried by a jury in a state court and the verdict had been set aside: Home Life Ins. Co. v. Dunn, 19 Wallace 214.

It has been held that in the trial of an equity case in a federal court, the judge may call in a jury to find upon issues, or may have a jury empaneled upon the law side of the court and its verdict certified to him, and that in either case the verdict is not binding upon him, but is advisory only. This is in accordance with the long established practice of courts of chancery; but it would seem contrary to the letter of the seventh amendment, and justified only by historic interpretation.

Prout v. Roby, 15 Wallace 472; Garsed v. Beall, 92 U. S. 684; Wilson v. Riddle, 123 U. S. 608; Idaho and Or. Land Co. v. Bradbury, 132 U. S. 509.

It was held by Mr. Justice Matthews, sitting on circuit, that an appeal lay to the circuit court from the district court in an admiralty case tried before a

jury, and that on appeal the case should stand for trial precisely as if there had been no jury, the seventh amendment being inapplicable: Boyd v. Clark, 13 Fed. 908.

In 1837, a policy of marine insurance was fraudulently procured, and the ship was fraudulently cast away and sunk. In 1838, a judgment was rendered against the insurance company by a circuit court of the United States in an action at law upon the policy, which was tried before a jury, and wherein these frauds were set up in defense. Having paid the judgment, the company brought an equity suit in the same court in 1841, to set aside the judgment and recover the money paid. The same matters were in issue, but there were newly discovered evidence and an additional element of fraud. The case was elaborately argued by able counsel, and was very fully considered by Mr. Justice Story, who overruled the demurrers: Ocean Insurance Co. v. Fields, 2 Story 59. The effect of the seventh amendment was not discussed; but it was necessarily involved, and the question of jurisdiction was considered on other objections. Before this time Mr. Justice Story had rendered the opinion in Parsons v. Bedford, had sat on the bench of this court for thirty years, and had published his Commentaries on the Constitution and his Commentaries on Equity Jurisprudence. He could not have overlooked the seventh amendment, had it been applicable to the case.

An action for damages was brought in a state court in Iowa against two men for assault. One of the defendants paid the plaintiff $100 for a secret release, and thereafter assisted in prosecuting the action for the joint benefit of himself and the plaintiff, and in obtaining by false testimony a verdict of $4,000 against the other defendant. The latter, having removed to another state and discovered the fraud, filed in the United States circuit court a bill in equity

to set aside the judgment, cancel execution sales made thereunder, and compel an accounting for the proceeds of the property sold. Judges Shiras and Woolson, sitting together, overruled the demurrers; but the question of the seventh amendment does not appear to have been raised: Young v. Sigler, 48 Fed. 182.

One Crim was sued at law upon promissory notes, and pleaded payment, failure of consideration, and other defenses. The case was tried before a jury, and resulted in a judgment against him. He then filed in the United States circuit court a bill in equity to enjoin the judgment because it was unjust, and because he had not had a fair trial in that sickness rendered his principal witness unable to testify, one of his counsel was unexpectedly absent, and he was unable to find certain documentary evidence. The circuit court dismissed his bill, and he appealed to this court. After stating the grounds upon which relief might be had in chancery from a judgment at law, this court, speaking through Mr. Justice Clifford, said: "Parties in suits at common law, where the value in controversy exceeds $20, are entitled to a trial by jury; but the same amendment to the constitution provides that no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law. ——— All suits not of equity or admiralty cognizance are embraced in that provision, and subject to its control. By its terms it is applicable only to common law suits, *and, of course, does not conflict with the rule before stated, that courts of equity may exercise jurisdiction to enjoin a judgment or to grant the injured party a new trial, in a case where the proof is clear, to show that it would be inequitable and against conscience to execute it*; as where it appears that the injured party had an equitable defense of which he could not avail himself in the suit at law, or if it appears that the defense

could be made at law, but that he was prevented from making it by fraud or unavoidable accident, unmixed with any fault or negligence in himself or his agents." The court then proceeded to examine each of the grounds upon which the bill sought relief, and to hold them all insufficient, as plainly they were: Crim v. Handley, 94 U. S. 652.

Embry sued Stanton and Palmer at law in the supreme court of the District of Columbia, to recover upon a quantum meruit the value of professional services rendered. The case was tried before a jury and he recovered a judgment for $9,185.18, which was affirmed by this court upon writ of error: Stanton v. Embry, 93 U. S. 548. He then sued upon his judgment in a state court of Connecticut; whereupon they filed in the same court a bill in equity to restrain for constructive fraud in its procurement all proceedings to collect the judgment, save as to $2,296.29 admitted to be due. The supreme court of Connecticut sustained the bill: Stanton v. Embry, 46 Conn. 65 and 595. Upon writ of error this court held:—(1) That the judgment was entitled to the same faith and credit in Connecticut as in the District of Columbia, and that therefore the question was whether a court of the District could have restrained the execution of the judgment upon the averments of the bill. (2) That the court of the District of Columbia was a court of the United States. (3) That the sufficiency of the bill must be tested by the decisions of this court in several cases that "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." (4) That the facts averred and found did not come up to this standard.

This necessarily involved a holding that a chancery court of the District of Columbia, a court of the United States, could reexamine and enjoin a judgment of a law court of that District though based upon the verdict of a jury. No question appears to have been made about the seventh amendment; but in discussing the merits of the case the court cited Crim v. Handley, and its attention must have been called to the amendment by reading that case: Embry v. Palmer, 107 U. S. 3.

Phillips sued Negley at law in the supreme court of the District of Columbia, and the latter denied all liability. The case was tried before a jury in the absence of Negley and his attorney, and a verdict was rendered for the full amount. After the expiration of the term, Negley filed a motion to vacate the judgment for fraud in its procurement, and the motion was granted. On writ of error this court held that the appropriate relief from a judgment at law wrongfully obtained is by a bill in equity; and that the power of a court of the District of Columbia over its judgments does not extend to their vacation for such reasons after the term at which they are rendered, "unless it is invoked in a formal bill in equity upon grounds recognized as furnishing a title to relief." It should be remembered in this connection that courts of the District of Columbia are courts of the United States, and subject to the provisions of the seventh amendment; and that the bearing of that amendment upon the case must have been called to the attention of the court by the decision in Crim v. Handley, which it cited: Phillips v. Negley, 117 U. S. 665.

RELIEF AGAINST FRAUDULENTLY PROCURED JUDGMENTS.

1.

Extrinsic Fraud.

Having reached the conclusion that the court in which the bill was filed and this court have jurisdiction to entertain it, the next question to be considered is whether the situation described by the bill is such as to entitle the plaintiff to relief under the established doctrines of equity. The fourth ground of demurrer urged by the defendants who are parties to this appeal is: "Because it appears that the fraud charged against their codefendants was the material issue in said trial of said former suit" (Tr., 26).

We do not think it properly can be said that the fraud of William A. Hunter and Jennie M. Mettler, which forms the basis of the present bill, was the material issue in the action at law of Mrs. Mettler against the insurance company. Ordinarily issues are presented by the pleadings in a case. In Mrs. Mettler's action against the insurance company she alleged "that the said William A. Hunter died on or about the 4th day of December, 1896" (Tr., 11); and again, "that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos River, being drowned near what is known as the 'Texas Bend' in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves County, Texas, to Mentone, in Loving County, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered" (Tr., 12). The defendant raised an issue upon these allegations merely by a general denial (Tr., 17-18). The pleadings made no issue of fraud, and if any such was involved in the case, it was so only indirectly, and because the evi-

dence seemed necessarily to prove either Hunter's death as alleged or his fraudulent disappearance.

The real issue presented by the pleadings in the action at law was the very simple one whether Hunter died at the time and place and in the manner set forth in the plaintiff's petition. In substance the bill charges that the verdict and judgment to the effect that he did so die were obtained (1) by the fraudulent manufacture of a chain of circumstantial evidence tending to show that he had so died; and (2) by the willful concealment from the court and from the defendant company of important evidence that Hunter was not drowned as alleged, that is to say, by the concealment of Hunter's living body, or the fact that he was still alive. Further it charges that the company exerted itself to the utmost to find evidence to make good its denial of Hunter's death, but that the concealments practiced by Hunter and Mrs. Mettler prevented it from doing so, until a few days before the filing of this bill, and several months after the judgment had been rendered, affirmed, and paid off. At that time, so the bill avers and the proof shows, an agent who had been employed by the company for several years in searching for Hunter, found him living in Alabama under an assumed name, and caused him to be confined in jail pending his extradition to Texas. By such devices the bill and the evidence show that the company has been swindled out of about $25,000. We believe that these facts measure up to the requirements of the strictest rules ever laid down by any court upon this subject.

In the language used by Mr. Justice Miller in announcing the decision of this court in the case of United States v. Throckmorton, 98 U. S. 61, counsel for the defense will find their strongest support. He said: "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court

of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." This language needs to be interpreted in the light of the facts.

In pursuance of the treaty with Mexico, the United States created a special tribunal, a board of commissioners, to which all holders of Spanish or Mexican land grants in California were required to submit their titles for confirmation and patent. From the board of commissioners appeals might be taken to the district court, acting under special authority and trying the cases de novo, and thence to this court. The decisions of the tribunals so constituted were declared to be final.

The Throckmorton case was one of three companion cases, heard together in the circuit court and reported there under the name of United States v. Flint, 4 Sawyer 42. They involved thousands of acres of land, and their pendency indirectly cast a cloud upon the titles of a large portion of California. Some or all of the original claimants were dead, and the lands had passed into the hands of others who had made valuable improvements thereon.

The suits, though brought in the name of the United States, were not instituted by the attorney general as they should have been, but by the district attorney and apparently at the instigation of speculators. This fact alone was held to be sufficient ground for their dismissal. There was, besides, a doubt as to the jurisdiction of the court to review the proceedings of the special tribunals. Such was the general atmosphere of the cases.

The suits were brought in the circuit court to cancel patents issued by the United States to the claimants, and to set aside the decrees of confirmation rendered by the commissioners and the district court. In the Throckmorton case the petition for

confirmation was filed with the commissioners in 1852. Their decree of confirmation was rendered in 1853, and affirmed by the district court in 1856; and the appeal of the United States to this court was dismissed by the attorney general in 1857. The bill to set aside the decree was filed in 1876, more than twenty years after its affirmance by the district court. The gravamen of the bill was that the written grant filed in the case had been fraudulently executed after the petition for confirmation was filed, and antedated so to appear to have been made at the proper time, and supported by perjured depositions. This written instrument appears to have been like other deeds, *not merely evidence of a conveyance, but the conveyance itself.* The only question controverted before the commissioners and the district court was the genuineness and validity of this grant; and the government's law agent seems to have had notice from papers in another case that it was fraudulent. The original archives were at all times in the possession of the United States; and the grant itself was on file in the suit for more than four years before the final decree of the district court was rendered. The bill did not set up any newly discovered evidence and excuse its late production, but rested upon the bald assertion that the grant was fraudulent and supported by perjury. In the circuit court Judge Hoffman thus stated the merits of the case:

"It is in effect contended that where a party has been forced to commence a suit to establish the genuineness of a document, and the suit is tried on that issue, his adversary may omit to bring forward proofs of its fraudulent character which are in his own possession, and which by reasonable diligence he might have produced; and afterwards, when judgment has gone against him, may ask a court of equity to set aside that judgment and retry the same issue, not on the ground of newly discovered evidence which could not by reasonable diligence have been procured, nor

on the ground of fraud practiced in the course of the proceedings, but on the allegation that the document adjudged to be genuine was in fact fraudulent, and that he believed in and was misled by the assertion of its genuineness made by his antagonist. And further, that this belief in the assertions of his adversary should excuse him for his laches in not producing proofs of the fraud in his own possession on the trial of the suit which he has himself compelled his adversary to bring to determine that very issue. A statement of this position is its own refutation."

As applied to and explained by the facts involved in the Throckmorton case, the language used in its decision is unexceptionable. But as laying down a general principle for future guidance the courts have not always found it apt. See Marshall v. Holmes, 141 U. S. 589; Graver v. Faurot, 64 Fed. 241, 73 Fed. 1022, 162 U. S. 435, and 76 Fed. 267; Maddox v. Apperson, 14 Lea 596 (615). What then is the true rule as applied to such facts as are here in question?

More than ninety years ago Chief Justice Marshall stated as follows the law relating to equitable relief from judgments improperly obtained, in language which ever since has been quoted or paraphrased by almost every American court with approval and without betterment:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully

and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law:" Marine Insurance Co. v. Hodgson, 7 Cranch 332.

In New York Life Insurance Company v. Bangs, 103 U. S. 780, Mr. Justice Field set forth more fully those phases of the rule which are applicable to the present suit, as follows:

"A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly discovered evidence which could not have been obtained at the trial and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered or the contract upon which it was recovered."

We believe that the two passages above quoted express the law of the case at bar; and also believe that its facts come within the rule of the Throckmorton case when that rule is properly interpreted and understood. The question settled by the decree atacked in the Throckmorton case was whether a deed was genuine. It was alleged by the plaintiff that it was not genuine. It was not claimed that any fraud had been perpetrated in the course of the legal proceedings, save that there had been perjury. The deed whose genuineness was attacked had been on file among the papers of the case for four years before the rendition of the decree, open to inspection; and all the evidence had been continuously in the possession of the government, with notice of the facts. The case was simply one of negligence upon the part of the representative of the government, the fraud charged occurring not in the conduct of the litigation, but in the creation of the thing about which the contention arose. In the present case there were genuine policies of insurance maturing upon the death of Hunter,

and the question at issue was whether he was dead. the plaintiff sought to prove his death by circumstantial evidence, all of which was deliberately and fraudulently manufactured for the purpose of being used as it was used: this was the affirmative side of her case. The living body of Hunter produced in court or identified by credible witnesses who knew the man, would have been conclusive evidence in the defendant's favor. This evidence Mrs. Mettler, in collusion with Hunter himself, concealed from the defendant and from the court, both by artifice and by direct perjury: this was the negative side of her case. Thus was the defendant prevented by fraud, without any fault or negligence in itself or its agents, from availing itself of a perfect defense which it had in the court of law. Thus was a fraud practiced upon the court, and an unconscientious advantage taken of the defendant, without any fault or negligence on its part. In the finding of Hunter's living body is newly discovered evidence which the bill offers to the court, and which could not have been produced on the trial at law, and which if produced would have changed the result. These frauds, in the language of the Throckmorton case, were "extrinsic or collateral to the matter tried by the first court," which was the simple question whether Hunter was dead: they were frauds connected with the litigation, and not merely with the cause of action.

The proposition that a court of equity will grant relief under such circumstances as we have here is supported by numerous decisions ancient and modern, among which are the following.

In 1691 the English court of chancery ordered a new trial of an action at law wherein the plaintiff by surprising the defendant had recovered a judgment against him on a forged bond, all the pretended witnesses to which were dead. The details of the case are not reported: Coddrington v. Webb, 2 Vernon 240.

Bonds issued by Lafayette County, Missouri, and owned by a citizen of Missouri, were valid according to the doctrines of the federal courts and invalid according to those of the state courts. Because of this situation, the owner made a fictitious assignment of the bonds to a citizen of Illinois, who sued on them in the federal court, and assigned back to the true owner the judgment which he there recovered. The plaintiff's ownership of the bonds was alleged and was necessarily involved in the case; but the falsity of the allegation being unknown to the defendant it was not controverted. For this fraud in the procurement of the judgment the supreme court of Missouri held that the owner should be perpetually enjoined from making any use whatever of it. The court said, speaking of the plaintiff and his assignor: "Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case, which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction:" Wonderly v. Lafayette County, 150 Mo. 635.

One Guild bought land and had it conveyed to his wife. Quarrelling with her, he caused his sister to sue him on a note, obtain a judgment, and levy her execution on the land under the claim that the debt antedated the voluntary conveyance. The wife filed a bill to enjoin the sale on the ground that the debt was fictitious, and the judgment collusively procured for the purpose of defrauding her. Guild and his sister testified that the debt was bona fide. The suit was then compromised, the wife taking half of the land and the execution resting on the other half. On his death bed Guild confessed to his wife that the judgment was fraudulent; and after his death she found among his papers a release signed by his sister, antedating the action on the note. She then sought

to set aside the decree in the injunction suit because of the fraud and the newly discovered evidence establishing the same. The sister demurred on the ground that whether the debt was fraudulent or bona fide was the issue made and settled in the injunction suit. The court overruled the demurrer, and on final hearing set the decree aside: Guild v. Phillips, 44 Fed. 461.

The case of Ocean Insurance Co. v. Fields, 2 Story 59, decided by Mr. Justice Story on circuit in 1841, and hereinbefore cited for its bearing on the constitutional question, was a bill to set aside a judgment rendered at law on a policy of marine insurance, and to recover the money paid thereon. The grounds were that the owner of the vessel had procured the insurance upon her by over valuation, and afterwards had bored holes in her bottom and cast her away for the purpose of wrecking her. Counsel for the company in his argument upon the demurrers made the following admission: "We admit that on the trial of this case it will appear that on the former trial the defendants alleged in defense the misrepresentation of the value of the vessel, and the attempt and design to cast her away on Mud Island, and failed to prove them. But we aver, that the distinct fraud of boring the vessel was (not) then alleged or suspected by us; and we admit that if an unsuccessful attempt to prove a fraud at the former trial takes from the plaintiffs the right now to show the same or other distinct and more gross frauds, we have no case." The demurrers were overruled, and in discussing this aspect of the case Mr. Justice Story said:

"But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now I agree that mere cumulative evidence

to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end of litigation, or, as was pointedly said by a great jurist, 'that suits may not be immortal, while men are mortal.' But I do not know that it has ever been decided that, in an assignable case, where the defense has been imperfectly made out at the trial, from defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full, and direct, and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and sustain a bill to bring bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity upon this head, seems, as far as I can gather it, not to encourage further litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. A fortiori all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case, which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime."

Christina Trefz sued Knickerbocker Life Insurance Company at law in a circuit court on two life insurance policies. The company's defense was that the applicant had made untrue statements regarding his health and habits. The case was tried before a jury, and at the trial the defendant abandoned its allegation of misstatements concerning habits because unable to prove them. Judgment was rendered against the defendant in 1877: 6 Ins. L. J. 850. Upon writ of error this court affirmed it in 1881: 104 U. S. 197. While the case was pending in this court, in 1881, the company, having discovered evidence es-

tablishing its defense based upon the applicant's misstatements about his habits, filed in the circuit court a bill in equity to declare the judgment fraudulent and to restrain its execution. The court stated the ground of relief to be: "That the two policies of insurance on which the judgment is founded were obtained by the fraud of the defendant and her deceased husband; that the fraud was unknown to the complainant at the time of the trial although it was suspected, and efforts were made to find evidence of it, and that it was known and concealed by the defendant on the trial so that the verdict was fraudulently obtained in her favor." While the writ of error was still pending, the court overruled the demurrers and required the defendant to answer: Trefz v. Knickerbocker Life Ins. Co., 8 Fed. 177.

David Mayer recovered twenty-four small judgments at law against Sarah F. Marshall in a court of the state of Louisiana on contracts made by her agent. The defense was want of authority in the agent to make such contracts. Mrs. Marshall filed in a state court a bill to enjoin all the judgments on the ground that the letter showing authority was forged, if it ever existed, and that she had newly discovered evidence to prove such forgery and fraud. Afterwards she sought to remove the cause to the federal court and the state court denied her right to do so. The question coming before this court upon a writ of error, it was held that the right of removal existed. Mr. Justice Harlan, in delivering the unanimous opinion of the court, entered at length into a discussion of the circumstances under which a court of equity will relieve against judgments at law, and in conclusion said: "While the court upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact, distinctly alleged, that some of

the necessary proof establishing the forgery of the letter was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner:" Marshall v. Holmes, 141 U. S. 589.

Graver brought a bill in equity in the superior court of Cook County, Illinois, to compel Faurot to surrender notes alleged to have been fraudulently obtained, and did not waive a sworn answer. Faurot answered under oath, denying the fraud, and in July, 1889, a decree was rendered in his favor on the pleadings. In January, 1894, Graver filed in the same court another bill, charging the same fraud, averring newly discovered evidence to prove it, and praying that the first decree be annulled and Faurot be enjoined from setting it up as an adjudication of the matters therein determined. The gravamen of the new bill was "that it was solely by reason of the suppression of testimony on the part of said respondents, and by absolute falsehood and perjury on their part in the allegations contained in their respective answers, and their respective affidavits, that said bill was dismissed for want of equity, and that the complainant was not able to obtain competent evidence to establish the allegations of his said bill." The cause having been removed to the United States circuit court, Judge Jenkins found himself unable to decide it because of a supposed conflict between United States v. Throckmorton, 98 U. S. 61, and Marshall v. Holmes, 141 U. S. 589. He therefore sustained the demurrer pro forma, leaving the matter to be determined by the circuit court of appeals: Graver v. Faurot, 64 Fed. 241. That court found itself in the same dilemma, and certified the question to this court: 73 Fed. 1022. This court dismissed the certificate: 162 U. S. 435. Thereupon the case came on again in the circuit court of appeals, before Judges

Woods, Showalter, and Baker: 76 Fed. 257. The decree was then reversed, with a direction to overrule the demurrer. The court held that the false answers and the concealments thereby accomplished were a collateral fraud under the doctrine of the Throckmorton case. It drew what seems to us to be a useless and unfounded distinction between proceedings at law and those in equity, holding that the plaintiff in an equity suit has the right to search his adversary's conscience. Surely that right also exists in an action at law under modern statutes permitting parties to testify, especially when the adversary takes the witness stand in his own behalf. After quoting from the Marshall case the court said:

"If there is here any inconsistency with the opinion in United States v. Throckmorton, to which reference was made, it was not the result of oversight, and ought perhaps to be regarded as an intentional modification of the earlier utterance. But whether there is a conflict between the two opinions, or how they are to be reconciled, we need not consider. The present case, if we have properly interpreted the facts alleged, is distinguished from both, and rests upon an equity of which there can be no just denial. In reason and good conscience a decree obtained as this one is alleged to have been ought to be annulled. There can be no consideration of public policy or of private right on which it ought to stand. There can and ought to be no repose of society where for such wrongs the courts are incapable of giving redress."

Stowell v. Eldred, 26 Wis. 504, was a cross bill to enjoin a judgment at law. In the former action the authority of the plaintiff's agent was a material issue. Having no other evidence of it, the defendant put the plaintiff on the stand, and he falsely denied the agency. About four years after the judgment, the defendant discovered evidence establishing the agency. It was held that *the plaintiff's* perjury was sufficient ground for enjoining the judgment, and that the defendant's action in going to trial in reliance upon

the plaintiff's telling the truth was not such negligence as to bar his right to relief.

One Fraker insured his life for a large sum in different companies, made his will, went fishing at night in the Missouri River with several companions, fell into the river and disappeared, betook himself to the forests of Minnesota, and lived in concealment for some years. His companions having reported him drowned, his executor sued the companies at law on the policies, and in the United States circuit court at Kansas City secured the verdict of a jury that Fraker was dead. There, as in the case at bar, the issue was whether the insured was dead; and the evidence that he was so consisted of a chain of circumstances manufactured by himself for the purpose of being described by innocent witnesses, and causing it to appear that he was drowned. The court set aside the verdict and granted a new trial; whereupon a compromise judgment was entered and paid. The companies continued to search for Fraker, captured him, and filed in the same court their bills in equity to set aside the judgment and recover the money paid thereunder. Judge Phillips of that court sustained the bills, set aside the judgment, and ordered the money refunded. The cases were not reported. The action at law was a consolidated case against all the companies under the style of James E. Lincoln, Executor, v. Provident Savings Life Assurance Society et al. The proceedings in equity may be found under the style of Kansas Mutual Life Association v. James E. Lincoln, Executor. Fraker was prosecuted criminally, and many of the facts are recited in the opinion of the supreme court of Missouri in that case: State v. Fraker, 148 Mo. 143.

2.

THE BILL DOES NOT COME TOO LATE.

The bill was filed about three weeks after the discovery and identification of Hunter, and not quite a year after the payment of the judgment. The fact that the judgment had been affirmed and paid before Hunter was found, in no degree lessens the power of the court to grant appropriate relief.

2 Story's Equity Jurisprudence, §886; 1 High on Injunctions, §112; 3 Pomeroy's Equity Jurisprudence, §§1360 and 1364; Bispham's Principles of Equity, §407; Parker v. The Judges, 12 Wheaton 561; Stanton v. Embry, 93 U. S. 548, 46 Conn. 65 and 595, 107 U. S. 3; Trefz v. Knickerbocker Life Ins. Co., 6 Ins. L. J. 850, 104 U. S. 197, 8 Fed. 177; Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 181 U. S. 179; Graver v. Faurot, 64 Fed. 241, 73 Fed. 1022, 162 U. S. 435, 76 Fed. 257; Young v. Sigler, 48 Fed. 182; Ocean Ins Co. v. Fields, 2 Story 59; Johnson v. Coleman, 23 Wis. 452; Furman v. Furman, 153 N. Y. 309; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

The injunction may be granted at any stage of the proceedings at law. It acts purely in personam, restraining the holder from availing himself of his judgment when in good conscience he should not do so. There is no more reason why one who has collected money under a judgment wrongfully obtained should be permitted to use the judgment as a defense against an action for its return, than there is for allowing him to proceed in the first instance to collect it after discovery of the wrong. If collection of the money was against conscience, its retention is equally so; and no person should be suffered to use the judgment for the accomplishment of either wrong, as a weapon of offense or one of defense.

In Parker v. The Judges, 12 Wheaton 561, it was

held that the holder of a judgment affirmed by this court was not entitled to an execution thereon, because while the case was pending in this court an injunction had been obtained in the court below staying all proceedings thereunder. Chief Justice Marshall said: "The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been, and could not be, litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. ——— The condition of a suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it."

The judgment attacked in Embry v. Palmer (Stanton v. Embry, above cited), 107 U. S. 3, had been affirmed by this court on writ of error before proceedings were begun in a court of the state of Connecticut to enjoin its use.

The judgment in the law case of Trefz v. Knickerbocker Life Ins. Co. was pending in this court on writ of error, when the circuit court overruled the demurrers to the defendant's bill to enjoin it for fraud and newly discovered evidence: 8 Fed. 177.

Streitwolf v. Streitwolf, 181 U. S. 179, was a bill to restrain the defendant in a divorce suit pending in New Jersey from setting up in defense a decree of divorce fraudulently procured by him in North Dakota. The injunction was granted by the chancery court and affirmed by the court of errors of New Jersey, and again affirmed by this court.

Graver v. Faurot, 76 Fed. 257, was a bill to set aside a decree, and particularly to enjoin the defendant "against setting up that decree as a final adjudi-

cation of the matters so determined." The demurrers were overruled.

Young v. Sigler, 48 Fed. 182, was a bill to set aside a judgment, cancel execution sales made thereunder, and compel an accounting for proceeds of property sold. The demurrers were overruled.

Ocean Insurance Co. v. Fields, 2 Story 59, was a bill filed in 1841 to set aside a judgment rendered in 1836 and duly paid, and to recover the money so paid. The demurrers were overruled.

In Johnson v. Coleman, 23 Wis. 452, a decree of divorce was set aside for fraud after the husband's death.

In Furman v. Furman, 153 N. Y. 309, the appeal was from an order entered in 1896 vacating a judgment rendered in 1877. The judgment was for partition of real estate among several heirs, one of whom was Minnie W. Furman, a minor. After the judgment determining the respective interests of the heirs was rendered and before sale was made under it, a motion was filed to set it aside for fraud of one of the parties; and it was set aside as to all of them except Minnie. In 1894, having grown up and married, she brought another suit for partition, claiming a one-fifth interest. It appears that her right was resisted upon the ground that she was not a legitimate child, and that she pleaded the judgment of 1877 as settling that question; so in 1896 a motion was filed to vacate the judgment. She resisted upon the ground that its vacation would deprive her of its use as an adjudication of her legitimacy, and that she was not a party to the fraud. The motion was granted and the order granting it was affirmed. This decides:—(1) that a judgment nineteen years old can be set aside for the sole purpose of preventing its use as an adjudication; and (2) that this can be done even though the person resisting was wholly innocent of the wrong infecting the judgment.

State of Michigan v. Phœnix Bank, 33 N. Y. 9, was a suit to recover money paid in obedience to a fraudulently procured judgment of a special tribunal. The amount involved was large; the question was interesting and important; the counsel were of great learning, Charles O'Conor appearing for the defendant; and the decision was made by a unanimous court after full consideration. The question as stated by the court was: "Whether money received by one party from another, by means of a judgment or other judicial proceeding which was obtained through the fraud, falsehood and imposition of the party obtaining it, upon the tribunal by which it was adjudged, and where the money so obtained was paid before the discovery of the fraud by the party paying it, can be recovered back by the party from whom through such means it was obtained." It was held that the plaintiff was entitled to recover, the court saying: "If a court of equity was limited in its power to grant relief by its decree, to nullify or declare void only such judgments or other securities obtained by fraud, as had not been carried into effect, it would fail in one of its most valuable attributes."

3.

THE SITUATION DEMANDS EQUITABLE RELIEF.

If one person gets possession of another's money by fraud, the law raises a promise to return it, and upon such implied promise an action may be maintained.

Bishop on Contracts, §226; Moses v. Macferlan, 2 Burrow 1005; Buller v. Harrison, 2 Cowper 565; Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. 225; National Life Ins. Co. v. Minch, 53 N. Y. 144; Gaines v. Miller, 111 U. S. 395; Merryfield v. Wilson, 14 Tex. 224; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

The fraud in this case consisted in obtaining by wrongful means a judgment that William A. Hunter had died, thereby rendering the plaintiff liable to Mrs. Smythe. Whether he had so died was the question directly in issue in the action at law, and the verdict and judgment therein are conclusive between the parties and privies, save upon such direct or collateral attack as may be permissible under the circumstances.

Bigelow on Estoppel, 90; Outram v. Morewood, 3 East 346; Hazen v. Reed, 30 Mich. 331; Monks v. McGrady, 71 Tex. 134; McGrady v. Monks, 20 S. W. 959.

The federal courts and the courts of all the states in which the various defendants reside agree in holding that a judgment cannot be collaterally attacked for fraud.

Christmas v. Russell, 5 Wallace 290; Peninsular Iron Co. v. Eells, 68 Fed. 24; K. C., Ft. S. & M. R. Co. v. Morgan, 76 Fed. 429; Commissioners of Lake County v. Platt, 79 Fed. 567; Maddox v. Summerlin, 92 Tex. 483; Anderson v. Anderson, 8 Ohio 109; State v. Ross, 118 Mo. 23.

Moreover, the federal decisions probably are controlling in this matter, as the judgment was rendered by a federal court: Embry v. Palmer, 107 U. S. 3.

The defendants Clark, Culberson, Spoonts and Phillips Investment Company are all privies to the judgment by assignment of interests in its subject matter, and are protected by it to the same extent as Mrs. Smythe.

Bigelow on Estoppel, 142-149; 2 Black on Judgments, §§549-550; Commissioners of Lake Co. v. Platt, 79 Fed. 567; Porter v. Bagby, 50 Kan. 412.

Therefore as to all the defendants equitable relief is necessary and proper in the case, if the facts are sufficient to warrant interfering with the judgment.

4.

EXTENT OF RELIEF.

It is the general course of chancery to proceed to grant full relief when once it has obtained jurisdiction of a controversy. This it does mainly for the purpose of avoiding a multiplicity of suits. Therefore in the present case, having jurisdiction to restrain the defendants from setting up the judgment as an adjudication, the court should not turn the plaintiff over to sundry law courts in Texas, Ohio and Missouri for the recovery of its money, but, if otherwise proper, itself should administer full relief by ordering the return of the money.

1 Story's Equity Jurisprudence, §§64K-71 and 456-457; 2 idem, §885; 1 Pomeroy's Equity Jurisprudence, §§181, 231 and 236; 2 idem, §910; Roy v. Duke of Beaufort, 2 Atkyns 190; Rickle v. Dow, 39 Mich. 91; Young v. Sigler, 48 Fed. 182; Ocean Insurance Co. v. Fields, 2 Story 59; State of Michigan v. Phœnix Bank, 33 N. Y. 9.

5.

BILL NOT MULTIFARIOUS.

In Gaines v. Chew, 2 Howard 619, this court sustained a bill brought to set aside the probating of a will fraudulently procured by the executors, and to recover from the executors and all purchasers under the will the property held by them. That case seems to us decisive of the contention that the present bill is multifarious.

LIABILITY OF THE APPELLEES.

1.

THE FACTS.

On October 27, 1897, Mrs. Mettler employed the firm of Alexander, Clark & Hall to institute and prosecute against the insurance company her suit up-

on the policies issued by it on the life of Hunter, "for a contingent fee of one-third of the amount recovered upon said policies." The contract contained a clause as follows: "It is understood and agreed that for and in consideration of the legal services rendered, and to be rendered, by the said Alexander, Clark & Hall, this instrument conveys to the said Alexander, Clark & Hall an undivided one-third interest in said policies" (Tr., 202-203). These negotiations were had with Mr. Clark, the appellee, a member of the firm (Tr., 345). He was informed at that time that the insurance company denied that Hunter was dead; and he knew during the entire progress of the litigation that this was its position (Tr., 354). On June 10, 1899, a new and substitute contract was made (Tr., 200-201). In this contract it was recited that the labor involved in the collection of the money was greater than had been anticipated, "the insurance company claiming: 1. That the proofs of death furnished did not and do not reasonably show death; ——— 3. That W. A. Hunter is not dead." After the preliminary recitals, the instrument proceeded as follows:

"Now, therefore, this agreement, or power of attorney, executed in lieu of and in substitution of said original power of attorney, in consideration of the facts above stated, witnesseth: That I, Jennie M. Mettler, the present owner of said policies, hereby ratify my employment of said attorneys, and do now employ them, the said Alexander, Clark & Thompson and W. L. Hall; and it is understood and agreed that the said Alexander, Clark & Thompson and W. L. Hall, will continue to prosecute said suit, as in their judgment they may deem proper, and in consideration of the legal services rendered, and to be rendered in the collection of said policies, by suit or otherwise, they are to receive and are hereby given, transferred, assigned and delivered one-third interest of, in and to said policies and claim against said life insurance association, and the further sum of $2500.00

thereof, that is, should the principal, accrued interest and 12 per cent. statutory damages, if allowed, amount to $18,000.00 and be collected, they would own and should receive $8500.00 thereof; as well as the attorneys' fees provided for by the statutes of Texas in such cases; and should a less amount on account of principal, interest and said 12 per cent. damages be collected by suit or compromise, they would own and should receive their pro rata part thereof, according to their interest aforesaid, as well as said attorneys' fees, if any, collected; it being understood that on account of the decision in G. C. & S. F. Railway Company vs. Ellis, 165 U. S. 150, it is very probable that a recovery of the ten per cent. attorneys' fees, as well as of the 12 per cent. damages, cannot be enforced. It is further understood and agreed that if said suit is compromised, it must be with the consent of said Mrs. Jennie M. Mettler and of Alexander, Clark & Thompson and W. L. Hall. It is further understood that the said Alexander, Clark & Thompson and W. L. Hall, may employ such associate attorneys to aid them in the prosecution of said suit as they may deem necessary, it being agreed that they are to pay such attorneys themselves, and the said Mrs. Mettler is not to be liable for attorneys' fees other than provided for above."

The policies were delivered to Alexander, Clark & Hall at the time of the original negotiation (Tr., 345). About January 1, 1898, Mr. Hall retired from the firm of Alexander, Clark & Hall, retaining his one-third of the firm's interest in the case. The remaining portion passed to the new firm of Alexander, Clark & Thompson. In 1899 that firm was dissolved, and in the partition of its business the Mettler case was taken by Mr. Clark, who also bought out Mr. Hall. This all occurred before the affirmance of the judgment by this court. Afterwards, on May 29, 1902, Messrs. Alexander, Thompson and Hall made formal assignments to Mr. Clark of their interests in the two contracts and the judgment (Tr., 346-347, 201 and 203). Both the contracts, with the assignments to Mr. Clark endorsed thereon, were filed with the

clerk of the circuit court June 3, 1902 (Tr., 202 and 203).

In 1899, Mr. Spoonts, one of the appellees, was employed by Mr. Clark to assist in the prosecution of the suit (Tr., 339). No contract was made at that time with reference to the fee of Mr. Spoonts, Mr. Clark simply stating that he would make the matter satisfactory. After the affirmance of the judgment by this court, they agreed upon a fee of $1,500, and Mr. Clark gave Mr. Spoonts an order for $1,500 payable out of the insurance money when collected. Mr. Spoonts left this order with the clerk. This was some time in the early part of May, 1902 (Tr., 341, 342-343). Afterwards Mr. Clark wrote Mr. Spoonts the following letter:

"Dallas, Texas, May 26, 1902.

Hon. M. A. Spoonts,
Ft. Worth, Texas.

My dear Spoonts: The Mettler judgment will be paid off in a few days. It will be paid to the clerk & I will have him send you a check for your part of the recovery, to-wit: fifteen hundred dollars ($1,500.00). Your friend,

W. H. Clark."

Mr. Spoonts sent this letter to the clerk, with one of his own, reading as follows:

"Mr. J. H. Finks,
Clerk U. S. Court,
Dallas, Texas.

Dear Sir: The def't's attorneys in case of Jennie M. Mettler vs. Fidelity Mutual Life Insurance Ass'n inform me that the amount of judgment will be paid into court within a few days. I have an interest of $1,500.00 in said judgment, which please remit to me at Fort Worth as soon as the money is paid over to you. Attached is a letter from W. H. Clark, which explains itself. Yours t'ly,

M. A. Spoonts."

These letters were filed by the clerk June 1, 1902 (Tr., 341 and 203-204). At the time of undertaking

to assist in the prosecution of the case, Mr. Spoonts knew that the insurance company denied that Hunter was dead (Tr., 342).

On December 30, 1901, while the case was pending in this court on writ of error, Senator Culberson, one of the appellees, was employed by Mr. Clark and Mrs. Mettler to defend the judgment here. He knew at that time that the insurance company denied that Hunter was dead (Tr., 354). His contract was in writing, and after some preliminary recitals proceeded as follows:

"Premises considered, we, the said Jennie M. Mettler, a femme sole, and W. H. Clark, her attorney, the owners of said judgment, hereby employ Chas. A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the supreme court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Chas. A. Culberson an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that payment of said fee is contingent upon a recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of said Mrs. Jennie M. Mettler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said W. H. Clark therein, and that the one is not to be responsible for the portion to be paid by the other; that is, each one undertakes to pay said Chas. A. Culberson five hundred dollars, as aforesaid."

This instrument was signed by Mrs. Mettler both personally and through her attorney, and by Mr. Clark (Tr., 70-71). It does not appear ever to have been filed with the clerk. The following letter from Senator Culberson to Mr. C. A. Rasbury was deposited with the clerk (Tr., 193 and 203):

"United States Senate,
Washington, D. C., May 8, 1902.

Mr. C. A. Rasbury,
Dallas, Texas.

Dear Rasbury: The insurance case against the Fidelity Mutual Life Association about which I wrote you some time ago, was affirmed on Monday, and in accordance with my agreement with Clark, my fee is $1,000 and is due when the judgment is paid. As I have heretofore written you, I will be glad if you will do me the kindness to collect this $1,000 for me, as Clark wires me to-day that the judgment will be paid in Dallas. He also owes me $26 for printing briefs, which please collect also and deposit the whole sum in the National Exchange Bank of Dallas to my credit, and notify me when it is done.

Very truly yours,
C. A. CULBERSON."

Mr. Clark instructed the clerk to pay Senator Culberson $1,026 and deduct it from the amount that should be paid to him (Tr., 193).

In 1901, Mr. Clark owed the appellee Phillips Investment Company $6,721.57, secured by a mortgage on real estate. The company desired a settlement of the debt, and he conveyed the mortgaged property to it for a credit of $5,250 on the debt; and under date of October 29, 1901, he gave them his note for the remaining sum of $1,471.57, due March 1, 1902, and secured by an assignment of his interest in the Mettler case (Tr., 349 and 197-198). The granting clause of said assignment read as follows:

"Now therefore, in consideration of the said Phillips Investment Company's having accepted a deed from him to said property in satisfaction of said principal indebtedness, and taken his promissory note for said sum of $1,471.57, as agreed and understood to secure the payment of said note of $1,471.57, I, the said W. H. Clark, do hereby assign, transfer, grant, sell and confirm unto the said Phillips Investment Company, all of my right, title and interest; that is, my contingent attorney's fees of about

$8,000.00 in the cause of action and judgment of $21,550.00 rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler vs. Fidelity Mutual Life Association of Philadelphia, numbered 2118; said judgment rendered as aforesaid in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States" (Tr., 297).

This assignment was filed with the clerk of the circuit court December 2, 1901. The settlement was negotiated between Mr. Clark and Mr. Young, a representative of the investment company. Mr. Clark's recollection is that he did not go into details with Mr. Young in regard to the nature of the litigation. The assignment was written on the stationery of Alexander & Thompson, successors to the firm of Alexander, Clark & Thompson; and the acknowledgment of Mr. Clark to it was taken by W. H. Mansfield, who was Alexander & Thompson's stenographer. Mr. Alexander's recollection is that he did not advise with Mr. Young in regard to the settlement, but was merely informed by Mr. Young that a settlement had been made. It is thought by Mr. Clark and Mr. Alexander that Mr. Young dictated the assignment himself to Mr. Mansfield (Tr., 354-355 and 358-359).

In all that they did relative to the prosecution of Mrs. Mettler's suit against the insurance company and in accepting compensation therefor, Messrs. Clark, Spoonts and Culberson were acting in entire good faith, believing that Hunter was dead, and that their client had a legitimate cause of action. The appellant never has alleged or attempted to prove anything to the contrary of this.

On May 29, 1902, the appellant issued its check for $24,028.25, payable "to the order of J. H. Finks, clerk of the United States Circuit Court, Dallas, in

full of judgment in the case of Mettler v. Fidelity Mutual Life Association, with interest thereon to June 4, 1902" (Tr., 268 and 185). This check was sent by the insurance company to its attorneys in Dallas, and by them was delivered to the clerk of the circuit court in settlement of the principal and interest of the judgment. The clerk endorsed it and deposited it to the credit of the United States Circuit Court, at Dallas, in the American National Bank of Dallas, which was a United States depository (Tr., 185, 190 and 206-207). At the close of business on June 2, 1902, the amount standing to the credit of the court in the bank was $912.68. On June 3rd, a deposit of $24,028.25 was made, consisting of the check received by the clerk from the insurance company. The bank had only one account with the circuit court at Dallas, not maintaining a separate account for each fund deposited in the registry of the court. On the books of the clerk this fund was carried as a separate fund (Tr.,190, 206 and 211-212). The bank credited the amount to the court in its account, and collected the check through its Philadelphia correspondent (Tr., 206).

On the same day that he received the check the clerk distributed the entire fund by giving to the distributees checks of the court on the bank as follows:

Check No. 424, in favor of Phillips Investment Company,	$1,540.25
Check No. 425, in favor of M. A. Spoonts, ...	1,500.00
Check No. 426, in favor of C. A. Culberson, ...	1,026.00
Check No. 427, in favor of "W.H.Clark, Attorney, to the use of himself", ...	8,346.00
Check No. 428, in favor of "W. H. Clark, att'y of record for Mrs. Jennie M. Mettler, to the use of Jennie M. Mettler",	11,616.00
Total, ...	$24,028.25

Mutatis mutandis, these checks were all alike in form, No. 428 reading as follows (Tr., 191 and 213-216).

"Registry Voucher No.——, Check No. 428.

In the Circuit Court of the United States of America, at Dallas, Texas.

Dallas, Texas, June 3, A.D. 1902.

In cause No. 2118 of Jennie M. Mettler, plaintiff, against Fidelity Mutual Life Association of Philadelphia, defendant.

To American National Bank of Dallas:

Pay to the order of W. H. Clark, att'y of record for Mrs. Jennie M. Mettler, to the use of Jennie M. Mettler, on account of judgment, the sum of eleven thousand six hundred sixteen dollars, out of the fund deposited in said cause.

Charge the same to the account of the United States circuit court at Dallas, Texas.

$11,616.00. J. H. FINKS,
Clerk of said Court,

(Countersigned) By_____, Deputy.
EDWARD R. MEEK,
Judge of said court."

For each of the payments so made by him, the clerk received a voucher. Mutatis mutandis, these vouchers were alike, the one from Senator Culberson being signed in his name by C. A. Rasbury, and the one from Phillips Investment Company being signed in its name by Alexander & Thompson. Mr. Clark's voucher read as follows:

"J. H. Finks, Clerk United States Courts,
Northern District of Texas.

No. 1529. Dallas, Texas, June 3, 1902.

Received of J. H. Finks, clerk, $8346.00—the sum of eight thousand three hundred forty-six /100 dollars, on account of judgment in case of Jennie M. Mettler vs. Fidelity Mutual Life Ass'n of Philadelphia, No. 2118.

W. H. CLARK" (Tr., 191 and 204-205).

The checks drawn by the clerk were all duly paid, as follows. Check No. 424 was endorsed by Phillips Investment Company to the Bank of Montreal at Chicago, by it endorsed and sent to the Fourth Street National Bank of Philadelphia, and by it endorsed and sent to the City National Bank of Dallas, to which bank it was paid through the clearing house June 16, 1902. Check No. 425 was deposited by Mr. Spoonts for his credit in the Ft. Worth National Bank of Ft. Worth, which sent it to the American National Bank of Dallas for credit of its account. It was so credited June 6, 1902. Check No. 426 was deposited by Senator Culberson in the National Exchange Bank of Dallas, and was paid to it through the clearing house June 12, 1902. Checks No. 427 and No. 428 were paid on June 4, 1902, to W. H. Clark. He seems to have taken for them cashier's checks amounting to $19,616, and $346 in money (Tr., 207, 208, 213-216 and 342).

Upon an adjustment of their accounts Mr. Clark remitted to Mrs. Mettler $11,160.50, as being the amount due her (Tr., 350). The money realized by Mr. Clark and Mr. Spoonts was paid out by them in the regular course of their business, and they had none of it on hand at the time of the institution of this suit (Tr., 349 and 344). There was no evidence as to the disposition made by Senator Culberson and Phillips Investment Company of the sums paid them.

When Alexander & Thompson received from the clerk the check in favor of Phillips Investment Company, they surrendered to the clerk Mr. Clark's note to the company, receipted by them in full, and the same was kept by the clerk as a part of his files (Tr., 198 and 359).

2.

GENERAL PRINCIPLES.

When property has been obtained by fraud, its true owner may recover it from any person except a bona fide purchaser for value, without notice. The authorities on this subject are numerous, and are believed to be unanimous in support of the proposition.

Buller v. Harrison. 2 Cowper 565; Thurston v. Blanchard, 22 Pickering 18; Devoe v. Brandt, 53 N. Y. 462.

The exception relates only to those kinds of property whose purchasers for value are protected by the policy of the law from equities outstanding against their vendors of which they had no notice. Such are money, negotiable paper, land and merchantable chattels, naming them in a descending scale of negotiability. A judgment is not such property. The policy of the law is to protect litigants, not outsiders dealing with judgments. The assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same or not, and regardless of the consideration paid therefor.

2 Black on Judgments, §§953 and 955; 1 High on Injunctions, §190; Taylor v. Nash. & Chat. R. Co., 86 Tenn. 228; Blakesley v. Johnson, 13 Wis. 592; Ind. School Dist. of Rock Rapids v. Schreiner, 46 Iowa 172; Rea v. Forrest, 88 Ill. 275; Northam v. Gordon, 23 Cal. 255; Weber v. Tschetter, 1 S. D. 205; Ellis v. Kerr, Tex. Civ. App., 23 S. W. 1050 and 32 S. W. 444; Wright v. Treadwell, 14 Tex. 255; Minn. Thresher Mfg. Co. v. Holz, 10 N. D. 16; Brisbin v. Newhall, 5 Minn. 273; McJilton v. Love, 13 Ill. 486; Wright v. Levy, 12 Cal. 257; Jeffries v. Evans, 6 B. Monroe 119; Devoll v. Scales, 49 Me. 320; Padfield v. Green, 85 Ill. 529; Mulford v. Stratton, 41 N. J. Law 466; Magin v. Pitts, 43 Minn. 80;

Fred Miller Brewing Co. v. Hansen, 104 Iowa 307; Ricaud v. Alderman & Flanner, 132 N. C. 62; Frankel v. Garrard, 160 Ind. 209.

We know of no conflict of authority on this subject. Mr. Black in the sections first above cited sums up the situation as follows:

"The assignee of a judgment takes it subject to all the equities subsisting between the original parties, whether he had notice of the same or not; he can occupy no better position, and acquire no firmer rights, than his assignor possessed. ——— The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons which would justify such action if it remained in the hands of the plaintiff. And when proceedings are instituted for any of these purposes, the assignor is not a proper or necessary party, as he has no longer an interest in the judgment. Upon the reversal of the judgment, the assignee, if he has purchased property under his own execution, will lose his title thereto. So if he has acquired rights under the judgment, and it is subsequently reversed, he must make restitution, the same as if he were an original party."

The supreme court of Iowa said in the case of School District v. Schreiner above cited:

"The defendants, Nathan Schreiner & Co., are shown to be innocent purchasers of the judgment for value, without knowledge of the frauds perpetrated by Van Sickel and others, in obtaining the warrants and procuring the judgment. But they hold it as assignees subject to all equities or defenses that could have been asserted against it while in the hands of the plaintiff, Van Sickel. Although these parties are innocent holders, the law will not, for their protection, enforce the fraudulent judgment. They stand in the same position of honest purchasers of stolen property; their rights are not superior to those of the plaintiffs, who the conspirators intended should become the victims of their frauds."

A policy of insurance is not a negotiable instrument, and the purchaser of it takes it subject to all equities: 1 May on Insurance, §386; 3 Joyce on Insurance, §2326. The same is true of an order drawn against a specific fund therein named: 7 Cyc. 578. Nor do we see how it can be contended that a fund of money deposited in the registry of a court, or which it is expected will be so deposited, possesses any of the elements of negotiability. The assignee of an interest in such a fund, it seems to us, takes only the title which the assignor had.

An order drawn against a particular fund constitutes an equitable assignment thereof pro tanto; and if such be the intention of the parties, it will be so held, even though the order be general in its form. The fund so assigned need not be actually in existence at the time of the giving of the order, provided it is to come into existence as the result of arrangements already made.

3 Pomeroy's Equity Jurisprudence, §§1280-1284; Fourth St. Nat. Bank v. Yardley, 165 U. S. 634; Brill v. Tuttle, 81 N. Y. 454.

3.

APPELLEES HOLD UNDER ASSIGNMENTS.

It appears to be the theory of the appellees that the assignments can be ignored, and the case be dealt with as if the fact were that Mrs. Mettler collected the amount of the judgment obtained by her against the insurance company, and then paid to her attorneys the fees owing by her to them for their professional services. We do not see how such a position as this can be maintained. As a matter of fact no portion of the avails of the judgment ever passed through Mrs. Mettler's hands, save the net sum of $11,160.50, sent to her by Mr. Clark. Each of the appellees received his part of the fund directly from

the court, in the form of a non-negotiable order in his own favor, drawn on the United States depository in which the fund was deposited, and payable out of that specific fund. The clerk and the judge, who respectively signed and countersigned the orders, were in no sense the agents of Mrs. Mettler. They were acting only in their official capacity, receiving and holding the fund in the name of the court, and distributing it among its apparent owners.

MR. CLARK'S POSITION.

While the suit was pending in the circuit court a new contract was made between Mrs. Mettler and Mr. Clark's firm, which by its terms became a substitute for the original contract. By this instrument it was provided that Mr. Clark and his partners should continue to prosecute the suit; and thereby, in consideration of their services rendered and to be rendered, Mrs. Mettler assigned, transferred and delivered to them a determinate interest, amounting to somewhat more than one-half, "in said policies and claim against said life insurance association." There was not anywhere within the four corners of the paper a promise upon the part of Mrs. Mettler to pay any sum whatsoever as a fee, either fixed or contingent. There was simply an assignment in the present tense of an interest in the policies and the claim against the insurance company, made in consideration of services rendered and to be rendered. And lest there might be implied an obligation upon the part of Mrs. Mettler to pay in some other way for services rendered or to be rendered by Mr. Clark and his partners, or by other attorneys who should be employed to assist them, it was expressly stipulated that if they should employ other attorneys they themselves should pay for their services, and that Mrs. Mettler should not be liable for any attorney's fees otherwise than as provided for by the assignment. This instrument

surely exempted Mrs. Mettler from any personal responsibility to Mr. Clark and his associates for fees, and it surely constituted Mr. Clark and his associates co-owners with Mrs. Mettler of the claim against the insurance company upon the Hunter policies. By taking a transfer they obtained the rights incident to ownership, and they could not have the rights without the attendant responsibilities. They had not yet paid the full consideration, though in due time they did so. But, as soon as made, the assignment was an executed conveyance, which could not be set aside except for fraud or mistake. If the attorneys had failed to render the services promised, Mrs. Mettler would have had a cause of action against them for damages for their breach of contract. They could not have limited their liability to the loss of their interest in the policies; nor could she have avoided the conveyance. The validity of the instrument was not at all dependent upon its being filed or recorded. If Mrs. Mettler had made a subsequent assignment, it would not have affected their rights. If the insurance company had settled with her, it could have protected itself only by showing that it had made the settlement in ignorance of their interest; and the policies were in their possession. Of course the assignment was subject to the equities of the insurance company, because the property conveyed (life insurance policies and a claim based thereon), possessing none of the peculiar attributes of negotiable instruments, could not be transferred in any other way. Probably Mr. Clark has now a cause of action against Mrs. Smythe (Mettler) for the reasonable value of his services, upon the ground that she deceived him into rendering them in exchange for an interest in a worthless and fraudulent claim. When the fund was about to be distributed, Mr. Clark chose to file his assignment with the clerk, and to receive his part of the proceeds of the litigation directly and in his own

right, rather than to receive the entire amount as Mrs. Mettler's attorney of record and in her right, and to make his own adjustments with her thereafter. Doubtless one reason for his choice was the fact that he had transferred to Mr. Spoonts and to Phillips Investment Company portions of his share of the fund, by written instruments which they had filed in court; and his own assignment was a necessary part of their chains of title, without which the clerk could not make payment to them. The facts, it seems to us, are entirely incapable of bearing any construction other than that the sum of $8,346, represented by check No. 427, was paid to Mr. Clark as a part owner of the fund. It was not paid to him as the attorney of Mrs. Mettler, or as compensation for his services. He had received his compensation long before in the form of a transferred interest in the cause of action, and had been able to use it as collateral security for his debt.

SENATOR CULBERSON'S POSITION.

The position of Senator Culberson does not appear to differ in any way from that of Mr. Clark. While the suit was pending in this court, the judgment of the circuit court having been suspended by a supersedeas bond, Senator Culberson was employed by Mrs. Mettler and Mr. Clark, claiming to be "the owners of said judgment," to defend the same in this court. In consideration of the services rendered and to be rendered by him, there was assigned to him by Mrs. Mettler and Mr. Clark "an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon." It was stipulated that the payment of said fee should be contingent on a recovery upon said policies. And it was specified that $500 of the amount should be paid out of Mrs. Mettler's interest in the suit and $500 out of Mr.

Clark's interest; and that neither should be responsible for the portion to be paid by the other. It seems to us that this paper can not be construed otherwise than as an assignment by Mrs. Mettler of an interest of $500 in her share of the cause of action and of the judgment, and by Mr. Clark of an interest of $500 in his share thereof, in consideration of Senator Culberson's agreement to render his professional services in this court. The inference that there was to be any liability on the part of either Mrs. Mettler or Mr. Clark to pay for these services in any way other than by the transfer so made is excluded by the terms of the agreement. If payment had been made to Mrs. Mettler or to Mr. Clark of the amount belonging to Senator Culberson, and the one receiving it had failed to turn over the proceeds, his right of action would have been not for services rendered, but for money had and received. He was a co-owner with Mrs. Mettler and Mr. Clark of the insurance policies and the judgment based thereon from and after December 30, 1901; and $1,000 of the $1,026 paid to him was paid to him as such.

POSITION OF PHILLIPS INVESTMENT COMPANY.

The nature of the rights of Phillips Investment Company in the fund can not be distinguished from that of the rights of Mr. Clark and Senator Culberson. While the suit was pending in this court, Mr. Clark assigned to the investment company, as security for a debt, all of his interest in the litigation, the language of the granting clause being as follows: "I, the said W. H. Clark, do hereby assign, transfer, grant, sell and confirm unto the said Phillips Investment Company, all of my right, title and interest; that is, my contingent attorney's fees of about $8,000.00 in the cause of action and judgment of $21,550.00 rendered thereon on the 4th day of July, A. D. 1900, in the United States Circuit Court for

the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler v. Fidelity Mutual Life Association, of Philadelphia, numbered 2118." This document transferred to the investment company as security all of the interest which Mr. Clark had "in the cause of action and judgment." Like Senator Culberson, the investment company seems to have thought it advisable to obtain an interest in the cause of action itself, for the quite sufficient reason that the judgment had not yet become a finality but was subject to reversal on the writ of error then pending. The assignment was made in the fall of 1901, as collateral security for about $1,500 of unpaid interest and taxes accrued on an old mortgage, the mortgaged property having been taken by the company in satisfaction of the principal (Tr., 197). It was filed soon afterwards among the papers of the cause, so as to affect with notice the insurance company and all others concerned. Since the assignment was not made absolutely but only as collateral security for a debt, it was necessary that the clerk should be given evidence of the continued existence of the debt and of its amount before he could make any payment thereunder. And it is a notable fact that when the clerk gave his check on the government depository to the attorneys of the investment company they receipted the note, but instead of surrendering it to Mr. Clark, as his voucher for a payment made by him, they surrendered it to the clerk of the court as his voucher for a disbursement made in his official capacity to the owners of a fund in his hands. This was no new transaction; it was merely the recognition of existing rights in exact accordance with the terms of the instrument creating them. It was not the present payment by Mr. Clark of his debt, but was the application to the discharge of that debt of a security long before assigned by him. Could Mr. Clark have

ignored this assignment? Could the clerk have done so after it had been filed with him? Could the insurance company have done so? Certainly not. Then with what show of reason can the investment company now claim that the assignment was a mere incident, affecting nothing? Mr. Clark's interest in the cause of action and judgment was subject to the plaintiff's equities, and he could convey to the investment company nothing more than he himself had. Nor is the investment company hurt by this view of the matter. It gave nothing for its transfer of the judgment except an extension of about four months of time for the payment of an old debt which Mr. Clark was unable to pay or otherwise to secure. Mr. Clark testifies that he does not think the assignment of the judgment even had any effect in procuring this extension (Tr., 355). Now that the supposed payment out of the collateral is found to have been in fact no payment, the discharge of the debt is avoided and the note remains a subsisting demand against Mr. Clark, who, so far as the evidence shows, is as well able to pay it now as he ever was. True, but for the assignment, he might have reduced his share of the judgment to money and have paid the note voluntarily in cash. This, in a sense, would have been payment with the insurance company's money, but the company could not have recovered it, because money passes from hand to hand unaffected by outstanding equities. But, if the investment company wanted that kind of protection, it should have left Mr. Clark free to collect his own credits and pay his own debts in the usual course of business. That was not what it desired. Mr. Clark had other debts (Tr., 349), and it wished to be protected against his possible failure to pay this one out of the money to be realized on the judgment. There was no way for it to obtain both advantages at the same time; and having made its election it must abide the consequences.

THE POSITION OF MR. SPOONTS.

In form the derivation of Mr. Spoonts's right to a share of the fund differs from that of the other appellees, but in legal effect we think it the same. Mr. Spoonts rendered professional services in the litigation at the request of Mr. Clark, and thus there arose an obligation upon the part of Mr. Clark to pay him the reasonable value of those services. After the judgment of the circuit court had been affirmed by this court, but before the insurance company had drawn its check in favor of the clerk for the discharge of the judgment, Mr. Clark and Mr. Spoonts agreed that the fee of the latter should be $1,500; and at the same time Mr. Clark gave Mr. Spoonts a written order on the clerk for $1,500, payable out of the proceeds of the judgment when received. Mr. Spoonts deposited this order with the clerk. For some reason the original paper was not introduced in evidence, and the only information we have as to its terms is the description given of it by Mr. Spoonts himself. He testifies that the order was "just a memorandum, telling the clerk to pay me $1,500 out of the fund when collected." And again he testifies that the understanding between him and Mr. Clark was that the order was not a general draft against any credit which Mr. Clark might have, but it was drawn against the money to be collected on the Mettler judgment (Tr., 341 and 343). The fund was not yet in existence, but it did come into existence within a month as a result of a judgment already obtained and affirmed by this court. The order constituted an equitable assignment of an interest of $1,500 in the embryonic fund. Probably also it operated as an assignment of a like interest in the judgment itself, out of which the fund was to arise (Fairbanks v. Sargent, 104 N. Y. 108; Holmes v. Evans, 129 N. Y. 233; Milmo Nat. Bank v. Convery, 8 Tex. Civ. App. 181). To illustrate, if thereafter

and before the check of the insurance company reached the clerk, Mr. Clark had made an assignment of his entire interest in the judgment, doubtless Mr. Spoonts could have held his $1,500 claim against the subsequent assignee. Both Mr. Clark and Mr. Spoonts appear to have taken this view of the matter. On May 26th, which was before the company made its remittance, Mr. Clark wrote to Mr. Spoonts: "The Mettler judgment will be paid off in a few days. It will be paid to the clerk & I will have him send you a check for *your part of the recovery to-wit: fifteen hundred dollars.*" Before the check was received by the clerk, Mr. Spoonts wrote him, saying: "*I have an interest of $1,500 in said judgment* which please remit to me at Fort Worth as soon as the money is paid over to you." If it be not true that what was done amounted to an assignment of an interest in the judgment itself, it certainly is true that it amounted to an assignment of an interest in the fund, and a settlement of the debt thereby. Mr. Spoonts may have a cause of action against Mr. Clark now, based upon his implied warranty that such a fund would come into existence, and that he had the unconditional right to dispose of it. But for the time being Mr. Clark's debt to Mr. Spoonts was fully settled by the order on the clerk, and Mr. Spoonts could not have maintained an action thereon. What has been said about the investment company's unwillingness to wait and let Mr. Clark pay his debt after collecting the judgment applies equally to Mr. Spoonts. Having enjoyed the benefit of the assignment and required Mr. Clark and the clerk to deal with him as a co-owner of the fund, it is too late for him in this litigation to change his attitude and assume the position of one to whom money was paid out of the proceeds of the judgment after the same had been realized upon by some one else.

The court will not have failed to observe, that Mr. Spoonts gave no new consideration for his assignment of an interest in the fund. He received it in satisfaction of an existing debt. So far as we are aware, antecedent indebtedness is held everywhere to be a valuable consideration for money. In the federal court, (since Swift v. Tyson, 16 Peters 1), and in Texas (since Greneaux v. Wheeler, 6 Texas 515), and probably in most, but not in all, other jurisdictions, it is held to be a valuable consideration for negotiable paper. In Texas (since Spurlock v. Sullivan, 36 Texas 511), and generally elsewhere, it is held not to be a very valuable consideration in land transactions. As we descend the scale of negotiability, and come to deal with things which in the ordinary course of business are not used for the settlement of debts, the requirement that new value must be given to support a claim of bona fide purchase becomes more strict. We think, therefore, that Mr. Spoont's position lacks equity in this particular also.

RESUME.

By her contracts Mrs. Mettler had secured exemption from personal liability for fees, and required her attorneys to rely wholly upon the cause of action for their compensation, transferring to them definite shares thereof. Therefore she owed them no duty save that of not misappropriating their part of the proceeds. She did not authorize the clerk to pay in her behalf any debts she might owe for fees or for anything else. He had no correspondence with her, and received no communication of any kind from her. So far as the evidence shows, she had no information as to the method by which the insurance company would satisfy the judgment. The company's check was payable to the clerk in his official capacity. As soon as received, it was deposited in the government depository to the credit of the court. The

checks given to the appellees were signed by the clerk and countersigned by the judge in the name of the the court. They were non-negotiable in form, and payable only out of the fund deposited in the cause. Each was payable to one of the appellees in his own right, except the one intended for Mrs. Mettler, which was payable to Mr. Clark as her attorney of record. As Senator Culberson had not filed his assignment, the clerk distributed the fund in accordance with the transfer from Mrs. Mettler to Mr. Clark, and he reimbursed himself out of the proceeds of the check which he received as her attorney (Tr., 350). No receipt was given by Mrs. Mettler or in her name for the full amount of the judgment; she receipted only for her share. No one of the appellees gave a receipt for money paid on account of fees, or for money paid by the clerk in behalf of Mrs. Mettler; each receipted in his own name and right for the money paid directly to him and no more, and for that as paid on account of the judgment. We have seen how the interests of all parties became fixed and fully vested before the insurance company drew its check, and how the fund was disbursed in exact accordance with such interests. Here our search ends; for this traces the fund into the hands of those whom we seek to hold responsible, without the intervention of any money, negotiable instrument, or other thing by whose use our equities might be cut off.

4.

APPELLEES HAD NOTICE.

The appellant's position is: (1) That its funds having been taken from it by fraud, it has the right to recover them from the persons who got them, unless such persons are entitled to the protection which the law gives to those who purchase certain kinds of property for value and without notice of outstanding equities. (2) That the appellees are not entitled to

such protection, primarily for the reason that the property purchased by them, and through whose ownership alone they came into possession of the appellant's funds, was not such property as the law permits to be sold free from the equities of third parties; and, secondarily, because they did not purchase without notice of the appellant's claim.

None of the appellees knew at the time of acquiring his interest that Hunter was not dead. But Messrs. Clark, Spoonts and Culberson all knew that the insurance company claimed that he was living. The evidence does not show just how much information Phillips Investment Company had; but at least it was apprised of the fact that the insurance company was denying liability. The notice which the three lawyers had was not in the nature of hearsay. They were dealing directly with, and were seeking to overthrow, the company's contention that Hunter was still alive.

A statement by one person or his representative to another that the former has or claims a certain right is actual notice to the latter of that right. Notice and knowledge are two very different things; and a man may have actual notice sufficient for all legal purposes of something which he does not know and which even in the best of faith he wholly disbelieves. Suppose that A is about to buy from B land which B obtained in exchange for money embezzled from C. C believes the facts to be as they are, but is unable to prove them. He goes to A and states that B bought the land with money embezzled from him, and therefore holds it in trust for him ex maleficio. B always has stood well in the community; A has known him for years, and has entire confidence in him; C is unable to bring convincing proof of his charge. A concludes that C is a base maligner, and buys the land from B for full value. C afterwards discovers satisfactory evidence, and sues A for the

land. Can he not recover it? Has not A had actual notice? Probably no lawyer would doubt it. Yet wherein does this differ in principle from that which occurred in the present case? The appellees are affected with notice, not because they are lawyers, but because they knew as a matter of fact before they went into the case at all what the insurance company's position was. If this is not actual notice, but only constructive notice to lose its effect after reasonable inquiry, then it is impossible for a person so situated to give actual notice.

The heart of the company's right is the fact that Hunter is not dead but living. No matter how much fraud had been practiced in obtaining the judgment, if Hunter really had been drowned as alleged, the result of the suit would have been right, and the company could not have disturbed it. The fraud is a collateral matter, whose discovery serves no purpose other than that of enabling the appellant to avoid the effect of the adjudication obtained thereby, and get back to the original question whether it owed the money. Now, the appellant gave notice to the appellees that Hunter was not dead. N'importe that they did not believe it. Having before them its assertion that he was not dead, and their client's asseveration that he was, they took their chances, and proceeded with their speculative litigation. They cannot murmur if now it transpires that they believed the wrong party. They have no just ground of complaint at being asked to return the money which the company was compelled to pay them by the fraud of their client and her co-conspirator, made effective through their efforts. They knew all the time what the company's claim was, and knew that it would make that claim good by any and all lawful means. And they charged their client well for the risk they were taking. They proved that a reasonable attorney's fee in the case was $2,500, and recovered judgment accordingly,

though that sum was about $700 or $800 more than their pleadings warranted. Yet they received the aggregate sum of $12,867.75, more than five times the fee which they proved to be reasonable. For what was this huge addition intended? It was compensation to them for (among others) the very risk that now has developed.

CONCLUSION.

The appellant's theory of its case may be summarized as follows.

The appellees got possession of the plaintiff's money through the fraud of their co-defendant, Mrs. Smythe. Therefore it has a right of action at law against them to recover its money by them had and received, unless they are entitled to be protected as purchasers for value and without notice. But if it were to sue at law it would be met by a good plea of former adjudication. Hence it is compelled to resort to a court of equity to prevent the setting up of such a plea. The court of equity, thus having obtained jurisdiction, will proceed to grant full relief by itself ordering the return of the money if the circumstances require its restoration. No use of the judgment ought to be permitted, because it was procured by fraud practiced upon the court and the appellant in the litigation itself, and not merely by fraud wrought into the cause of action sued upon. The provisions of the seventh amendment to the constitution do not inhibit the exercise by this court of the power invoked; because the amendment must be construed in the light of its history, and at the time of its adoption, it had been for more than a century a rule of the common law to submit its verdicts and judgments to reexamination in chancery for fraud in their procurement.

For several reasons the appellees are not entitled to be protected as purchasers for value and without

notice. (1) Each of them received his part of the fund directly from the court in which the appellant had deposited it in satisfaction of the judgment; and in legal effect this is the same as if the appellant, acting under compulsion of the judgment, had given its own checks to the appellees for the portions by them severally claimed. (2) Each of them received what he got in right of ownership enjoyed by virtue of a previous assignment to him of an interest in the insurance policies, or in the judgment, or in the fund resulting therefrom. They cannot be protected as innocent purchasers of any one of these things; because no one of them possesses the property of being transferable free from existing equities. (3) They cannot be protected as purchasers without notice, for the additional reason that, with the possible exception of Phillips Investment Company, each of them had at the time of first acquiring his interest in the fund, or in that from which the fund arose, actual notice of the appellant's claim that Hunter was not dead, and that therefore it owed no one anything on account of the policies.

We do not dispute the general proposition that the rendition of professional services by a lawyer, or his contract to render such services, may form a valuable consideration for property conveyed to him as compensation therefor. But more than this is needed to block the pursuit of the real owner of the property seeking to recover it. Let us strip this case bare and look at it a moment. Mrs. Mettler is attempting to perpetrate a gross fraud upon the company, and finds herself unable to carry out her plan without a lawyer's assistance. She deceives a lawyer into believing that the company is trying to evade her just demands, and gains his co-operation by ceding to him the half of her claim, he knowing all the time precisely what the company's position is. Through his efforts, seconded by the continuance of

her dishonest practices, the fraud is made effective. Later, the facts are discovered, and restitution is sought. Now the lawyer says: "It is true that you did not owe my client a cent, and I must confess that her claim upon you was a wicked swindle. You were not deceived; you were guilty of no negligence; you fought all the time with sleepless vigilance; you told me what the facts were, and I knew your version of them before I engaged my services. But the woman fooled me. I believed her claim to be valid, and for a half interest in it I undertook to prosecute it for our joint benefit. I did so; and, aided by her continued fraud and perjury, I was stronger than you. After years of labor I got you down, and took your money away from you by the process of convincing a court that I was right and you were wrong, whereas in truth you were right and I was wrong. I gave half the money to the woman, and kept half myself. You may have back the woman's half, if you can find it. But for my half I worked hard, and gave to the woman a valuable consideration. I must have compensation for my services, even though it come from the one against whom they were rendered. A bird in the hand is worth two in the bush; and I prefer keeping your money which I have, rather than depending on the woman to pay me for the work which she deceived me into doing for her. By my alchemy her fraud has been transmuted into gold, and I purpose keeping it. I intend keeping even my part of the $4,300 and interest which you were compelled to pay as a penalty for not handing over your money immediately on demand." Now, this is no caricature. It is a fair paraphrase of the plea of purchase for a valuable consideration urged by the lawyer defendants. There is something radically wrong about a plea that presents such an ethical monstrosity; and we have endeavored to point out the defect. Usually it is true that what is right in

morals is right in law; but this case is an exception, if in a court of equity the appellant is not entitled to the restitution of all the money wrested from it by so outrageous a fraud.

In consideration of the premises, the appellant, The Fidelity Mutual Life Insurance Company, prays this court to reverse the decree of the court below, and to render a decree in accordance with the prayer of its bill.

MAURICE E. LOCKE,
EUGENE P. LOCKE,
Counsel for Appellant.

February 26, 1906.

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No. 25.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
OCT 12 1906
JAMES H. McKENNEY,
Clerk

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THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

REPLY-BRIEF FOR APPELLANT.

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(19,771.)

SUPREME COURT OF THE UNITED STATES.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY v. WILLIAM H. CLARK ET AL.	19,771. October Term, 1905. No. 270.

REPLY-BRIEF FOR APPELLANT.

So far as practicable, we shall follow in this reply-brief the order of discussion adopted in our original brief.

THE PROOF OF FRAUD.

On pages 28 to 58 of our original brief, we stated the evidence supporting the contention of the appellant that the judgment at law was procured by means of a fraud to which Mrs. Smythe was a guilty party. No answer to this has been attempted in behalf of the appellees, and no denial has been made by them of the charge of conspiracy. The brief submitted for them does contain, however, an insinuation two or three times repeated of which the following is one of the expressions.

"Yet now, because its general agent, its paid inspector and one or two other witnesses, of whose character we know nothing, say that Hunter is alive, it is to be permitted to re-open the case, and re-try in equity the issue of fact which was decided against it at law. If this is done, then the defendants may in turn inquire whether or no there be a conspiracy between Brown, Milliken et al., and if so, force another trial of the issue so long as the courts may remain open" (Brief, 71).

The "one or two other witnesses of whose character we know nothing," who constitute the "al." of "Brown, Milliken et al.," were these: (1) H. B. Taylor, inspector for a mortgage company, who knew Hunter at Quanah and Pecos: Tr., 180-181; (2) John H. Stuart, traveling agent of an agricultural implement house, who knew Hunter at Alvarado, Quanah and Dallas, and who was one of the intimate friends named by him as references in his application for the insurance: Tr., 216-218 and 394; (3) R. S. Johnson, sheriff of Reeves County, who knew Hunter at Pecos, and who, as an act of charity to Mrs. Smythe, caused a search to be made for him after his disappearance: Tr., 119-120; (4) J. B. Gibson, county attorney and former district and county clerk of Reeves County, who knew Hunter at Pecos, and who, as an act of mercy to Mrs. Smythe, searched out the camp of her missing brother, and who was her star witness at the trial of the insurance case: Tr., 94-95, 97-105, 107, and 426-436; (5) R. D. Gage, the lawyer-banker of Pecos, who knew Hunter there, with whom Hunter left his policies pending their accidental discovery by Mrs. Smythe, who appears from what they say of him on page 82 of their brief to be favorably known to counsel, and whose character as one than whom as lawyer and man none in Texas stood higher was vouched for under oath in this case by his college-mate and intimate friend, the appellee William H. Clark: Tr., 150-152, 345, and 351; (6) Judge M. L. Crawford, one of the leading lawyers of Dallas, a member of the bar of this court as its rolls will show, and who was of counsel for Hunter in his criminal prosecution and for Mrs. Smythe in this suit: Tr., 334-337 and 88; (7) the habeas corpus proceedings in Ex parte Hunter alias Hunt, showing Hunter's long fight in Alabama against extradition to Texas, and the opinion of the Court of Criminal Appeals of Texas in Hunter alias Hunt v. The State, 81 S. W. 730, showing his conviction for swindling the insurance company in this matter, and his appeal to and discharge by that court because of the insufficiency of the statute to cover the offense: Tr., 403-412 and 337.

Without further comment, we shall assume as established both the existence of the conspiracy to defraud and Mrs. Smythe's participation therein.

JURISDICTION OF THE COURTS.

We have been informed that counsel for the appellees intend to move for a dismissal of the appeal upon the ground that the existence of the constitutional question did not authorize a direct appeal of the entire case to this court. If they do so, we shall put in a separate brief on the motion whatever we may have to say on that subject. With this exception, the jurisdiction of the courts is not challenged, save in so far as it may be involved in the controversy as to the effect of the seventh amendment to the constitution. Counsel seem to have misapprehended the argument on this constitutional question contained on pages 62 to 74 of our brief; but as we believe the views there expressed to be correct, and as we have no fear that any member of this court will fail to understand them, further discussion of the topic in this place seems unnecessary.

FRAUD NOT THE ISSUE IN INSURANCE CASE.

In connection with their argument on the constitutional question, counsel for the appellees have discussed at length a matter to which we adverted briefly, under the heading of "Extrinsic Fraud," on pages 75 and 76 of our original brief, viz.: their claim that the issue of fraud was adjudicated in the insurance case. Lawyers, and sometimes courts as well, are prone to forget that it is the office of pleadings to define the issues in a lawsuit, and that ordinarily it is to them we must look in order to learn what were the issues involved in a case. Nevertheless, such is the fact.

Now, the pleadings in the insurance case do not contain a word about fraud in connection with Hunter's disappearance.

The only issue of any importance here was raised by the plaintiff's allegation that Hunter died on December 4, 1896, by drowning in the Pecos River, and by the defendant's general denial. It is perfectly true that from the beginning the officers and agents of the insurance company were convinced that the case was one of fraudulent disappearance, and fought it on that theory, and that the event has proven their sagacity. It may be conceded also that to a person of only normally developed power of believing things, the evidence adduced in that litigation must have indicated either that Hunter had died by accidental drowning or that he had disappeared for the purpose of defrauding the insurance company. Yet, theoretically at least, such an alternative was not inevitable. Hunter's body might have wandered off while his mind was already aberrant; and no motive of any kind could have been assigned for the act. The annals of the psychologists contain records of that kind. Nor was it inconceivable that, fearing prosecution for some other misdeed, Hunter should have chosen to depart from his accustomed haunts and to leave behind him a false trail that would throw the hounds off the scent. If we were at liberty to relate the remarkable story that Hunter told from the witness stand in his criminal trial, it would furnish an apt illustration of the point we are making. But the defendants in this case did not choose to have him tell it again for the delectation of the chancellor, and it is not in the record.

The burden of allegation and proof was upon the plaintiff, not upon the defendant. It had only to deny. Accordingly, the issue tried was one framed by the plaintiff, to-wit: whether Hunter died December 4, 1896, by drowning in the Pecos River, not whether he disappeared at that time for the purpose of defrauding the insurance company.

EXTRINSIC FRAUD.

It is not our contention that the case of Marshall v. Holmes overrules that of United States v. Throckmorton, or that the latter case was wrongly decided. But frequently it happens that a sharply drawn distinction, epigrammatically expressed, accurate and forceful as applied to the facts then under consideration, is adopted indiscriminately, and is misleading in its effect when the attempt is made to apply it to facts wholly different. Particularly is this true when the words were uttered by a great judge, whose memory is venerated by all lawyers. We think that these remarks have some pertinency to the language used by Mr. Justice Miller in the decision of the Throckmorton case, and that the history of subsequent litigation so shows, as pointed out on page 79 of our original brief. A test that requires interpretation before using, is a dangerous test; and to go no further, the decisions cited by counsel for the appellees sufficiently prove that this one is of that character.

Fraud is multiform and ever changing. Hence courts usually have preferred to refrain from defining in advance precisely what fraud would, and what would not, vitiate things seemingly valid. Lord Hardwicke once said that he was unwilling to declare his opinion, for fear of some new contrivance: 1 Vesey, Sr., 120. To decide as a matter of general rule that fraud of a certain kind, or fraud brought to bear in a certain way, will not destroy that which it infects, is hazardous. In this spirit was framed the statement of Chief Justice Marshall, which has been approved by judges and jurists almost without number, and which, with its paraphrase by Mr. Justice Curtis, has been cited by this court perhaps a dozen times:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which

clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law:" Marine Ins. Co. v. Hodgson, 7 Cranch 332.

It seems to us that to rest upon the rule thus clearly and broadly stated is safer than to attempt any more narrow and refined discriminations. Probably every case of this nature which has been decided rightly since its enunciation can be brought within its terms, and accounted for sufficiently by its application; and in a very great number of such cases it has been cited and relied upon.

Should forgery and perjury, both or either, open a judgment? Doubtless the truth is that sometimes they should have that effect and sometimes they should not; and trouble has come from the undertaking of courts to say, once and for all time, that they always should or never should be sufficient to move a court of equity. In many, perhaps in most, cases it is impossible to say that but for the perjury complained of the judgment must have been different. Moreover, it unfortunately is true that false swearing is encountered in a very large percentage of courthouse contests. Its presence is to be expected; and ordinarily a litigant is negligent if he announces ready for trial unprepared to meet it and to expose it. Yet there can be no doubt that Graver v. Faurot, 76 Fed. 267, and Stowell v. Eldred, 26 Wis. 504, and Birch v. Birch, L. R., (1902) P. 62, and other cases of similar character, were determined correctly. The judgments complained of in those cases were clearly unconscionable, and were obtained by perjury without which they could not have been gotten, and against which, under

the circumstances that existed, diligence could not protect. There is no sound reason why a scoundrel who chooses to put his rascality into the form of forgery, or of perjury, or of subornation of perjury, rather than into that of bribing his opponent's attorney, should enjoy securely the fruits of his fraud. The courts which, since the decision of the Throckmorton case, have busied themselves with defining what constitutes intrinsic fraud and what extrinsic fraud, have agreed pretty generally that to bribe the attorney of one's adversary is extrinsic fraud. But suppose that in the course of a litigation between A and B, A bribes B's attorney; and suppose that the circumstances are such that B ought to discover the treason of his attorney from the latter's conduct, or from other facts open to his observation; can he remain supine until after the termination of the action at law, and then call upon the chancellor to retry his controversy? Assuredly not. There is one fundamental principle that runs all the way through, and applies as well to forgery and perjury as to other species of fraud. A litigant must use a proper degree of diligence and intelligence in the management of his lawsuit. If he does this, and nevertheless an unconscionable judgment is obtained against him by the fraud of his adversary, no matter what form that fraud may take, he is entitled to relief in equity. In law as in theology, there is a tendency to a dead formalism, to a wearing of phylacteries and a repeating of rules by rote. The priesthood ought to resist this tendency, and to keep the vital principles always in mind. And we submit that in this kind of case the vital principle is as stated by the great chief justice: "*Any fact which clearly proves it to be unconscionable to execute the judgment, and * * * of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.*"

But if the magic words "intrinsic fraud" and "extrinsic fraud" have any proper place in the present discussion, their interpretation is to be sought in the facts which gave occa-

sion to their use. So interpreted, we should say that the forged instrument was an intrinsic fraud, and that the false depositions introduced in its support were an extrinsic fraud. The genuineness of the document was the very matter on trial; and the depositions were influences brought to bear for the purpose of affecting the decision of that matter of controversy. The decree was an adjudication that the paper was genuine; and that adjudication could not be overturned merely by showing that it was erroneous, which would be the whole effect of proving that the paper was forged. It could be attacked successfully only by establishing: (1) that the decree itself was procured by fraud, without the intervention of which it could not have been obtained, and to show the falsity of the depositions would be a step in that direction; (2) that no negligence of the complainant contributed to bring about the rendition of that decree; (3) that the decree was wrong, because if right it would not be vitiated by the improper means used to procure it, and only to this phase of the case would the question of forgery be relevant. The second essential element, as here analyzed, was the one which the complainant could not supply. This appears to us to be the true rationale of the Throckmorton case, in so far as its decision was based upon the original merits of the controversy, unaffected by the time and manner of instituting the suit. The decree was in no sense an adjudication that the depositions were true. Belief in them might or might not have contributed to the rendition thereof. To illustrate: suppose that in an action brought by a woman for damages for the murder of her husband, the issue is whether the killing took place in self-defense. A witness testifies that he was present and saw everything that was done, and that the fatal shot was fired while the deceased was standing with his hands up, begging for his life. The jury wholly discredits this testimony, and yet finds that the killing was not done in self-defense, because the bullet entered the dead man's back. The verdict is consistent with a belief in the statement of the witness, but

certainly the judgment based on the verdict is not an adjudication of the truth of that statement.

To apply these remarks to the present case: the question in issue in the action at law was whether Hunter had died as alleged. The jury found that he had, and the court so adjudged. That settled the matter forever between all parties and privies unless the judgment was erroneous, and unless further it was procured by the fraud of the victorious party without any contributing negligence of the defeated party. Beyond all doubt, the judgment was erroneous, for Hunter still lives. The wolf signs which he left behind when he disappeared were something collateral to the issue; they were devices employed to influence the decision of the court upon the issue; they were extrinsic fraud. The case which precipitated the memorable controversy between Lord Ellesmere and Lord Coke, mentioned on pages 64 and 65 of our original brief, was one in which Ellesmere restrained the execution of a judgment obtained by decoying the defendant's witness away from court. That surely was a collateral and extrinsic fraud. The jury did not pass upon anything which that witness said; his testimony was not before it. In the action of Mrs. Smythe (Mettler) against this appellant, Hunter was the defendant's chief and only necessary witness. To put him, living and breathing, upon the stand, and to obtain from him the statement that he was the same Hunter whose life was insured by the policies in suit, would end the case. Mrs. Smythe and Hunter conspired together to keep this witness away from court, to get him out of reach of its process, to conceal his existence even from both the court and the defendant company; and they succeeded in doing so. Why is not this a collateral and extrinsic fraud, fully within the narrowest limits that possibly can be given to that expression?

One of the chief reasons why false swearing ordinarily is not sufficient to open a judgment is that the pains and penalties of perjury, and the great opportunity which a litigant

has to sift by cross-examination the testimony of an adverse witness, are an adequate protection in most instances against this particular kind of fraud. But here, in the main, the witnesses told the truth. It was the starved horse, the imprint of the sleeper in the bed, and the one-way track ending with a mark of slipping and a broken shrub just over the river's brink that lied. Of what avail were cross-examination and the penalties of perjury here? Moreover, this was not the act of a single individual, or the aggregate of the acts of several individuals working separately, whose deeds might not always fit together with deceptive nicety. It was the carrying out of the elaborately perfected plan of Mrs. Smythe and her brother conspiring together. The great power for evil of such confederacies is recognized by the law; for everywhere a conspiracy to offend is itself a crime. In the face of such an iniquitous fraud the defendant insurance company was helpless. The court of criminal appeals has held that this sort of thing is not crime, for that the statute is not broad enough to cover it; and now this court is asked to hold that it is not "extrinsic fraud," and that so forsooth the malefactors may enjoy in peace, sitting in the shade of the courthouse, the fruits of their rascality.

We of course cannot undertake, in this hastily prepared reply-brief, to analyze all the authorities cited by counsel for the appellees upon this subject; nor is it necessary that we do so. But we do wish to say something of those upon which they principally rely, and which they emphasize by extended quotation.

In Pico v. Cohn, 91 Cal. 129, which counsel call "one of the most carefully considered decisions in the books," the question was whether a deed absolute in form really was a mortgage. Aside from the parties to the instrument, no one was present at its making except one Johnson. Pico sued to redeem, and introduced this man as a witness. Johnson swore that the deed represented a sale; but the court did not believe him, and rendered its decree for Pico. A second trial was had, Johnson dying in the meantime.

Pico's counsel desired portions of his evidence; and thinking that circumstances sufficiently discredited those parts which were adverse, they introduced the record of his testimony on the former trial, knowing it to be false and believing it to be corrupt. This time the court believed Johnson's statement, and decided against Pico. Afterward evidence was found that Johnson had been bribed, and a bill in equity was founded upon that discovery. In other words, Pico sought to open the judgment because of newly discovered evidence tending to discredit testimony which he himself had introduced after mature reflection, knowing exactly what it was, knowing that it was false, and believing it to be corrupt. The remarkable feature of that case is not its discussion of intrinsic and extrinsic fraud, but is the fact that doubt was entertained for a moment as to its proper disposition. The court gave a very poor reason for an eminently just decision.

In Pepin v. Lautman, 28 Ind. App. 74, 62 N. E. 60, the defeated defendants in a foreclosure suit endeavored to set aside the judgment because the plaintiff had testified falsely, an offense of which they had not believed that he would be guilty. They alleged the newly discovered fact that he had account books which, if produced, would prove that his testimony was untrue. But the record did not show that when they heard his statement, knowing that it was false, they made any effort to meet it, or to get time in which to meet it, or that they undertook by cross-examination to learn of the existence of books, though the plaintiff was a merchant with whom they had traded and who might have been presumed to keep books. Nor did the record show that after judgment had been rendered against them they moved for a new trial. Their claim to equitable relief evidently was barred by their own gross negligence.

Counsel quote some vigorous words spoken obiter by Lord Justice James in Flower v. Lloyd, L. R., 10 Ch. D. 327. That was a suit to restrain infringement of a patent process of litho-

graphing on tin. In the course of the litigation, an expert was sent to inspect the process used by the defendants, and his was substantially the only evidence on the subject. Upon it, the vice chancellor rendered a judgment for the plaintiff, which the court of appeal reversed, dismissing the suit. After this, three recently discharged employés made affidavits tending to show that when the expert visited the works the defendants concealed from him parts of their process, so that he had no opportunity of discovering wherein it was like that of the plaintiff. Thereupon the plaintiff moved for a rehearing in the court of appeal, with leave to introduce this new evidence. The court denied the motion, upon the ground that the plaintiff could get relief by a suit in the lower court to set aside the decree because it was obtained by fraud. Such a suit was instituted, and upon hearing the evidence, the vice chancellor did set aside the former decree as having been obtained by the fraud above mentioned. The court of appeal reversed this decision, solely because in its opinion the evidence failed to establish the fraud. The case stands, therefore, as a clear authority for the proposition that the former decree should have been set aside because obtained by the fraud alleged if such fraud had been proven. The first decision of the court of appeal is reported at L. R., 6 Ch. D. 297. The opinions rendered by the judges are interesting. We quote from them:

Jessel, M. R. "If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy. * * * Now, had the court of chancery any jurisdiction to give relief in such a case? It plainly had. I will read from the well known treatise of Lord Redesdale: 'If a decree has been obtained by fraud it may be impeached by original bill.' * * * Now that being so, supposing the court of appeal has no jurisdiction to do what is now asked, there would be means of obtaining justice by an original action."

James, L. J. "I agree with what has been said by the Master of the Rolls, that in the case of a decree (or judgment as we call it now) being obtained by fraud there always was power, and there still is power, in the courts of law in this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, 'You obtained the judgment by fraud, and I will have a rehearing on the whole case' until that fraud is established. The thing must be tried as a distinct and positive issue: 'You, the defendants, or you, the plaintiff, obtained that judgment or decree in your favor by fraud; you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud.' That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried. That was the old course of the law, and there seems to be no reason why that should not be now followed; and if it was true that there was a fraud practiced upon the court, by which the court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud."

Baggallay, L. J., after saying that at first he felt hesitation in denying jurisdiction to do what was asked, continued: "But, upon further consideration of the case, I think that justice can be done by adopting a course analogous to that taken under the old practice, where when a decree had been obtained by fraud a bill was filed in the original court in which the suit had been brought for the purpose of setting the decree aside. I therefore do not see any reason to dissent from the view expressed by the other members of the court."

When the case got back to the court of appeal the second time, after deciding unanimously that as a matter of fact there was no fraud, James, L. J., delivered the remarks quoted by counsel, in which Thesiger, L. J., concurred. Baggallay, L. J., then said:

"With reference to the observations which have just been made by the Lord Justice, I only wish to state that, whilst I am fully sensible of the evils and inconveniences which must arise from reopening what are apparently final judg-

ments between litigating parties, I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly found that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful party of the advantages to be derived from what he had so obtained by fraud."

Flower v. Lloyd has been cited frequently in the English courts, and has been used as authority for the proposition that a fraudulently procured judgment will be set aside in a new suit brought for the purpose. The remarks of Lord Justice James have been treated as cautionary merely: See, for instance, Boswell v. Coaks (House of Lords, 1894), 6 Rep. 167. Cole v. Langford, L. R., (1898) 2 Q. B. 36, was such a case. There a verdict and judgment were set aside because they had been obtained by the introduction in evidence of forged letters and of memorandum books containing fa and fraudulent entries. Ridley, J., said that he thought the plaintiff was entitled to judgment. Then Phillimore, J., said: "I am of the same opinion. There are several cases since Flower v. Lloyd in which this jurisdiction has been exercised, notably the case of Priestman v. Thomas," L. R., 9 P. D. 210.

Another recent case is that of Birch v. Birch, L. R., (1902) P. 62 and 130. This was a motion to dismiss on summary hearing in accordance with the English practice an action brought to set aside the fraudulently procured probate of a will. The fraud alleged was this. When the will was propounded, the witnesses to it could not be produced. Thereupon one Guise, himself not a party to the proceedings, but the husband of a party, testified that he had found a man, a stranger to him, who was a witness to the instructions for the will. This man then was called, and testified; and the will was admitted to probate. Afterward he confessed that the

will was forged at the instance of Guise, and that the evidence supporting it of course was fraudulent. Barnes, J., denied the motion, holding that a judgment may be impeached for fraud, and that Guise was interested and was acting as agent for his wife, who was a party. On appeal, with new affidavits and counter-affidavits, the decision was reversed, solely because it did not seem probable that substantial evidence could be brought to support the charge of fraud. Cozens-Hardy, L. J., in his opinion, concurred in by Stirling, L. J., said:

"The present action is an independent proceeding to set aside that judgment on the ground that it was obtained by fraud. I do not doubt that such an action may be maintained, at least when the judgment has been procured by the fraud of a party to the action. Here Henry Guise, against whom fraud is alleged, was acting for and as the agent of his wife, who was a party, and she must be affected by his fraud."

The late case last cited has its exact parallel in a very old one, Barnesly v. Powel, 1 Vesey, Sr., 119 and 284. This was a bill before Lord Hardwicke to be relieved in chancery against a forged will, "which was not without evidence to support it, although there was strong suspicion of forgery," and the probate of which in the ecclesiastical court had been obtained by fraud. The report does not show the nature of the fraud, but naturally it would be perjury, or mis-representation in some form. The verdict of a special jury having been taken to the effect that the will was forged, Lord Hardwicke ordered the defendants to consent in the ecclesiastical court to the revocation of the decree of probate. For some purpose a decree had been obtained also in the court of exchequer that the will had been well proven, and Lord Hardwicke restrained Powel "from setting up that decree in respect of the real estate, or claiming any benefit thereby."

We shall close our discussion of this subject with some emphatic language used by Lord Brougham in a notable case in

the House of Lords, wherein foreclosure decrees were set aside for fraud in a suit brought after a lapse of more than forty years against the heirs of the man who had purchased under them:

"In co-ordinate courts there can be no review at all. But if the decree has been obtained by fraud; if the whole suit has been concocted from the beginning to the end in fraud, that decree shall avail nothing for the party obtaining it in the further prosecution of his claims, and it shall avail nothing against the party affected by it, and against whom it is set up, to the defeating of his right, to the destruction of his property, or to stay the prosecution of the claim against those who have done so:" Bandon v. Becher, 9 Bligh, N. S., 532 (570).

LIABILITY OF THE APPELLEES.

Upon this subject it does not appear to us to be necessary to add very much to what was said in our original brief, aside from some consideration of the authorities cited for the appellees. On pages 81 to 95 of their brief, counsel for the appellees present a statement of facts which they assure the court is "fair and succinct," but which to a great extent lacks the customary references to the transcript for its verification. We should have been glad to have these references, because for quite a number of the averments we have been unable to find any authority.

It is true that contracts for contingent attorneys' fees are upheld in Texas, and that an attorney so contracting is not required to give security for costs in behalf of his client, and that relationship to an attorney holding such an agreement does not disqualify a judge. Judges are not disqualified under the Texas statutes on account of relationship to any person not "a party" to the suit; and under the statutes no one but "the plaintiff" is required to give security for costs. The courts have held that the legislature used the words "party" and "plaintiff" in their technical sense, and that the

possession of an interest in a litigation does not make one either a "plaintiff" or a "party."

Counsel say on page 95:

"In the present case the complainant disclaims any liability of these respondents on the theory of wrongful conversion. It seems instead, to be seeking to rest its case upon some theory of trusteeship on the part of these respondents. Confused with this idea is that of following its funds, and should it fail in these remedies, it seems to gather comfort from the assumption that possibly respondents are liable as for money had and received. Should all these fail, then the long array of decisions about the vulnerability of judgments in the hands of assignees to equities existing between the original parties is relied on. We believe the fair and succinct statement of the facts detailed above explodes all these conflicting, vaguely defined and unsupported theories."

We hope the court will acquit us of the charge of confusion of ideas; and we beg to disclaim responsibility for the numerous theories which counsel attribute to us in order that they may have the pleasure of "exploding" them by their "fair and succinct statement." It is, however, somewhat remarkable that they find so many theories upon which they seem to fear that the court may grant the relief sought. Is it a case of all roads leading to Rome? The only theory for which we are responsible is, we think, expressed with a reasonable degree of clearness on pages 119 and 120 of our original brief, where we say:

"The appellant's theory of its case may be summarized as follows.

"The appellees got possession of the plaintiff's money through the fraud of their co-defendant, Mrs. Smythe. Therefore it has a right of action at law against them to recover its money by them had and received, unless they are entitled to be protected as purchasers for value and without notice. But if it were to sue at law it would be met by a good plea of former adjudication. Hence it is compelled to resort to a court of equity to prevent the setting up of such a plea. The court of equity, thus having obtained jurisdic-

tion, will proceed to grant full relief by itself ordering the return of the money if the circumstances require its restoration. No use of the judgment ought to be permitted, because it was procured by fraud practiced upon the court and the appellant in the litigation itself, and not merely by fraud wrought into the cause of action sued upon. * * *

"For several reasons the appellees are not entitled to be protected as purchasers for value and without notice. (1) Each of them received his part of the fund directly from the court in which the appellant had deposited it in satisfaction of the judgment; and in legal effect this is the same as if the appellant, acting under compulsion of the judgment, had given its own checks to the appellees for the portions by them severally claimed. (2) Each of them received what he got in right of ownership enjoyed by virtue of a previous assignment to him of an interest in the insurance policies, or in the judgment, or in the fund resulting therefrom. They cannot be protected as innocent purchasers of any one of these things; because no one of them possesses the property of being transferable free from existing equities. (3) They cannot be protected as purchasers without notice, for the additional reason that, with the possible exception of Phillips Investment Company, each of them had at the time of first acquiring his interest in the fund, or in that from which the fund arose, actual notice of the appellant's claim that Hunter was not dead, and that therefore it owed no one anything on account of the policies."

There is no occasion for the appellant to follow a trust fund. Each of the appellees got its money directly from it, in contemplation of law. Nobody embezzled its money. There is no trust fund in the case, except in so far as one who has in his possession property equitably belonging to another may be said to hold it in trust for the owner. In this case it cannot be of any significance that the appellees have not the money now in hand. They did have it. They received its benefits. They bought property with it, or paid debts with it. It passed into their estates, making them just so much the richer; and in that sense no doubt they have it now. If one is seeking merely to follow a fund, of course he must find it first of all. But that is not this case.

Here it is claimed that the appellees received the appellant's money under circumstances which in law created an implied obligation to return it. This obligation they have not met; and what they have done with the money is wholly immaterial.

The appellant does not invoke the doctrine of lis pendens. Therefore we think irrelevant the decisions that one who purchases land from a person whose title has been confirmed by judgment is not a purchaser pendente lite, though the time for appeal has not yet expired; and that his rights are not affected by the reversal of the judgment in an appeal subsequently prosecuted.

The appellant's suit, save in so far as it asks preliminary relief in equity against the judgment, is virtually an action for money had and received. We understand that, while classed as an action at law, this suit always has been held to proceed upon equitable grounds. The broad question is whether the defendant has received money to which the plaintiff has the better right, which under all the circumstances it is inequitable and unjust for the defendant to retain, and which, ex aequo et bono, he ought to refund. We shall now attempt, in the light of this principle, to analyze some of the more important cases cited by counsel.

Clifford & Bntg. Co. v. Donovan Com. Co., Mo. 94 S.W. 527.

Bank of United States v. Bank of Washington, 6 Peters 8, cited on page 95. Triplett & Neale recovered a judgment against the Bank of Washington, which the latter paid to the Bank of the United States as agent of Triplett & Neale, notifying it verbally that a writ of error was contemplated and that if the judgment were reversed the Bank of the United States would be expected to return the money. The Bank of the United States placed the money to the credit of Triplett & Neale, asked for instructions as to how it should be applied, and upon such instructions applied it upon certain debts owing to itself. The writ of error having been prosecuted and the judgment reversed, the Bank of Washington sued the Bank of the United States to recover the money. It was held that the judgment was in full force

when the payment was made, Triplett & Neale then having the right to demand payment; and that the subsequent reversal of the judgment gave a right of action against Triplett & Neale, but not against the bank which had no interest in the matter, and receiving the money only as agent had disbursed it in accordance with the directions of its principal. This case would be in point if the appellant were suing the appellee Clark for the money which he received as attorney of record for Mrs. Smythe (Mettler) and remitted to her.

Holly v. Missionary Society, 180 U. S. 284, cited on pages 95 and 96-8. Dr Saul left by will to the missionary society three-fourths of his estate, to be appropriated one-third each to domestic missions, foreign missions, and colored missions. Afterwards, by codicil, he made the missionary society his residuary legatee. His estate amounted to $17,268.03, of which $14,927.54 was awarded to the missionary society. On June 19, 1890, Thompson, one of the two executors, called at the office of the missionary society, exhibited a memorandum showing due to it the above mentioned sum of $14,927.54 and $650 of dividends received after the award, and gave it in settlement of the legacy his individual check for $15,577.54. The missionary society deposited the check to the credit of its general account in bank, and before receiving notice that anything was wrong expended its proceeds in accordance with the directions of Dr. Saul's will. In May, 1890, Holly bought a house and employed Thompson to look after the title. On June 19, 1890, he gave Thompson his check for $12,000 wherewith to pay for the house. He heard no more of the matter until July 15, 1890, when he learned that Thompson had attempted suicide. Finding then on investigation that Thompson had paid $10,028 of his money to the missionary society in the transaction above described, he sued to recover that amount from the society. Thus it appears that Holly and the society were entire strangers; that Thompson occupied no position of trust with reference to the society, being in his representative

capacity its debtor and nothing more; that the funds left by Dr. Saul to the society were not given to it generally, save possibly to the extent of the residuary legacy as to which the record is silent, the money being entrusted to it for specified purposes and it being constituted in this way his agent for the disbursement thereof in accordance with his directions; that the payment was made by Thompson to the society in the form of a negotiable check having no earmarks to connect it with any trust fund; that before notice of anything wrong the society had executed its agency by disbursing all of the money as directed in the will; and that Holly was the only party to the transaction who had trusted Thompson and placed him in position to perpetrate the wrong. Thus this case falls within the same rule as the bank case in 6 Peters, namely: that it is not equitable that an agent who in good faith receives money for his principal and disburses it on account of his principal should be called upon personally to return the money because of some defect in his principal's title, a rule which is itself only a particular application of two or three broader rules.

Merchants' Ins. Co. v. Abbott, 131 Mass. 397, cited on pages 95 and 98-100. The company had a policy of fire insurance on property of Abbott, which he caused to be burned on March 17, 1876. Abbott furnished proofs of loss, and the claims were adjusted in due course, without discovery of any reason for refusing to pay. Abbott owed Denny, Rice & Co. about $4,000, and in April, 1876, after the adjustment of the loss, he paid them about $1,500 and gave them as security an assignment of his claim against the insurance company. In June, 1876, the company paid them the amount due under the policy, exactly liquidating Abbott's debt. In May, 1877, the company learned that it had been defrauded. In June, 1877, Abbott went into bankruptcy, and in the following October received his discharge. In January, 1878, the company sued both Abbott and Denny, Rice & Co. to recover the money. The court held that it was entitled to recover as against Abbott, but not as

against Denny, Rice & Co. Thus it appears that the assignees were wholly innocent; that they had nothing to do with the effectuation of the fraud; that they received a voluntary payment of a claim for a specific sum of money which had been assigned to them after its adjustment by agreement between their assignor and his debtor; that in consideration of such payment they surrendered a valid demand of like amount against their assignor, which his discharge in bankruptcy occurring more than a year later would have barred if they had been compelled to return the money. Manifestly it was not equitable under the circumstances that they should have to make good the insurance company's loss, against which a closer investigation at the time of the fire probably would have protected it. The present case is quite different. The fraud was effectuated through the efforts of the lawyer appellees, and the only consideration which they gave for what they got was their services rendered against the appellant. The payment which they received was not voluntary, but was forced by them after all possible resistance had been made. The insurance company had been guilty of no want of diligence to protect itself. They did not acquire their interests in the fund by assignment for value after an amicable adjustment between their assignor and the insurance company, and without suspicion of possible dispute; but they acquired them by buying into an existing controversy, and rendering in consideration therefor their services in connection with such controversy. Their claims against their assignor and against each other had not been barred by bankruptcy, limitations, or otherwise at the institution of this suit, but could have been adjusted and enforced by means of cross bills in this suit if they had deemed such adjustment and enforcement desirable.

Walker v. Conant, 69 Mich. 321, cited on page 96. Van Riper got $1,000 from Mrs. Conant on a forged mortgage. Afterwards he obtained $4,000 from Walker on another forged mortgage covering the same property, and by his direction Walker paid off Mrs. Conant's claim out of the

proceeds of his loan. The payment was made by Mrs. Conant's agent sending the papers to Walker's agent at his request, and by Walker's agent depositing the money in bank to the credit of Mrs. Conant's agent. Walker was no worse off because of paying the money to Mrs. Conant instead of to Van Riper, and Mrs. Conant was worse off by her surrender and the probable destruction of her papers. This appears to have been a payment of money into bank, and money passes free from secret equities. Both parties were equally innocent and equally negligent. If there was any difference in equity it was in favor of Mrs. Conant, who gave up her papers for the money at the request of Walker, and not upon her own initiative in any way. There was no ground for shifting the loss. Yet upon these facts, Chief Justice Sherwood dissented.

Langley v. Warner, 3 N. Y., 327, cited on page 96. On November 14, 1845, Walsh obtained against Langley a judgment for $76.22, Warner being his attorney. On the next day a writ of certiorari was served to remove the case into a higher court; but there was no supersedeas. The judgment was collected by an officer on execution and paid to Warner as attorney for Walsh. Walsh being indebted to Warner consented that the latter retain the money for credit of his account. In January, 1846, the judgment was reversed, and a writ of restitution was awarded against Walsh. Walsh having failed to restore the money, Langley sued Warner for it in the action for money had and received. The court, speaking through Chief Justice Bronson, made our distinctions for us. We quote:

"If the defendant had been the assignee of the demand on which the suit was brought by Walsh in the marine court, and had commenced and carried on the suit in the name of Walsh, but for his own benefit, he would have been bound, on the reversal of the judgment, to refund the money which had been collected on the execution." * * * But, "Walsh had a perfect title to the money when it was collected—just as perfect as it would have been if no certiorari had been issued. He had a right to do what he pleased with

the money; and he made a very proper use of it by paying his debt." * * * "We are referred to cases where money paid to an agent has been recovered back from him, notwithstanding the fact that he had given his principal credit for the money in account. But they are all cases where the principal had no right to the money at the time it was paid to the agent; while here, the principal had a perfect right to the money at the time his agent received it. The distinction is obvious; and I cannot but marvel that it should have been overlooked."

In the case at bar, Messrs. Clark and Culberson were assignees of interests in the cause of action, and prosecuted the suit in their assignor's name for their joint benefit. Neither they nor any other of the appellees received the money as agents of the judgment creditor; but each received it in his own name and right, as part owner of the fund. When received, the judgment creditor had no right to the money, because her judgment had been procured by means of her own fraud.

Justh v. National Bank of the Commonwealth, 56 N. Y. 478, and Stephens v. Board of Education, 79 N. Y. 183, cited on page 96, are both mere cases of failure to follow embezzled or fraudulently procured funds into the hands of innocent parties who had nothing to do with the fraudulent transactions, and who acquired the funds in the form of negotiable checks, in good faith and for a valuable consideration.

Glover v. Coit, 36 Tex. Civ. App. 104, cited on pages 96 and 100-102. Coit died leaving a will in which he left all his property to his wife. Its probate was contested on the ground that it was procured by undue influence. This was found not to be true, and the will was admitted to probate. Then the devisee conveyed certain land to her attorneys in payment of their fees earned in the litigation. Their interest in the land appears to have originated at that time, after the rendition of the judgment probating the will. Afterwards, certiorari was had, and the case was tried anew in the district court. Contemporaneously, the attorneys brought suit

against the heirs to quiet their title. The two cases were consolidated, and a verdict on special issues was taken. Upon the jury's findings, the court rendered judgment establishing the will, and awarding the land in controversy to the attorneys. It was said that the judgment of probate was in full force when the conveyance to the attorneys was made, that the issue of fraud had been adjudicated therein, and that they had a right to rely upon that adjudication. It is to be noted, that the fraud charged was fraud practiced in procuring the will, not in procuring the judgment; that the existence of such fraud was the very matter in dispute in the probate proceedings; and that when the attorneys bought the land there was a subsisting judgment in full force, which settled that matter. Moreover, the second trial also resulted in a judgment that the will was valid. In the case at bar, all the appellees except Mr. Spoonts bought while there was no judgment in force; and what they bought was not property incidentally affected by the litigation, but was an interest in the cause of action and suit itself; and the fraud charged was fraud practiced in the litigation.

The other cases cited by counsel on pages 95 to 102 of their brief do not appear to us to be closely enough in point to justify detailed analysis here.

It is contended by the appellees that because the appellant discharged the judgment without waiting for the service of an execution, its payment was voluntary and it is not entitled to restitution. This is not a suit to recover money paid under duress; it is a suit to get back money obtained by fraud. Suppose there had been no judgment; suppose that Mrs. Smythe had assigned to the appellees interests in her claim just as she did, and that they, being themselves misled by her fraud, had presented the case to the appellant so forcibly as to deceive it and to induce it to pay the policies without suit: there would have been no compulsion, but the appellant would have had the same right of action for the return of the money that now exists. There can be no doubt, however,

that this payment was made under compulsion, though probably the situation could not be said to constitute a technical duress. It had exhausted all its means of defending against the claim by the use of facts then known. There was nothing left for it to do but to pay the judgment. An execution would issue within a few days, and under the statutes of Texas, if it failed to pay the same promptly, its license to do business in the state would be revoked. To say that for the purposes of this suit the appellant's payment, made under such circumstances, should be classed as a voluntary payment, is absurd.

For answer to that portion of the argument of counsel contained on pages 105 to 107, we cannot do better than to refer the court to pages 106 to 116 of our original brief. That the rights of the parties are to be determined by the same rules that would be applicable if the appellees had taken no assignments of interests in the policies, judgment, or fund arising therefrom, and if Mrs. Smythe had collected her judgment, and out of its proceeds when reduced to the form of money or of credit in bank had paid fees to her attorneys, and they in turn had paid their debts in the usual manner, is a contention which we think the undisputed facts do not justify. In a rough and general way it is true that by virtue of what was done the lawyers got pay for their services, and the investment company got the sum due upon its note. But they were not content to permit the matter to follow the usual channels. They desired and obtained the protection of assignments of specific interests in the controversy; and we see no good reason why they should not bear now the responsibilities incident to the position which they voluntarily assumed then for their own benefit and without consulting the wishes of the appellant.

Respectfully submitted,

MAURICE E. LOCKE,
EUGENE P. LOCKE,
Counsel for Appellant.

APRIL 24, 1906.

FILED
OCT 12 1906
JAMES H. McKENNEY, Clerk.

No. 25.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted].

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT ON MOTION TO DISMISS.

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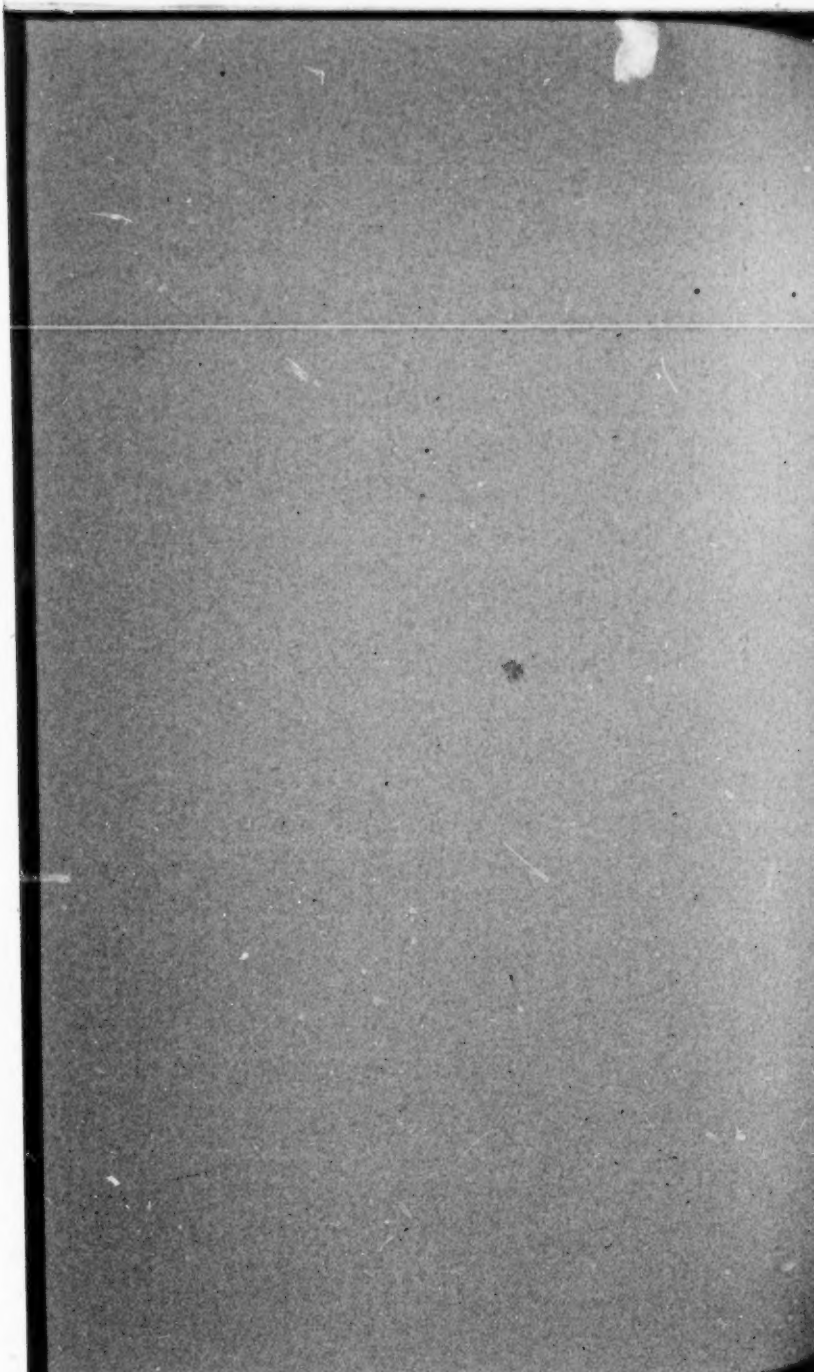
(19,771.)



SUPREME COURT OF THE UNITED STATES.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY
v.
WILLIAM H. CLARK ET AL.

19,771.
October Term, 1905.
No. 270.

BRIEF FOR APPELLANT ON MOTION TO DISMISS.

As the appellant's direct appeal to this court is based solely upon the provisions of the fourth clause of section 5 of the judiciary act of 1891, we shall not follow counsel for the appellees in their consideration of other matters, but shall inquire (1) whether this case comes within the scope of that clause, and (2) whether, if it does, there is any extraneous reason preventing the application thereof to the appeal.

1.

This is a suit in equity, brought in the circuit court for the northern district of Texas, by a citizen of Pennsylvania against citizens of Texas, Ohio and Missouri, for the purpose of restraining the use of a judgment at law theretofore obtained in said court by means of fraud, and recovering about $24,000 paid under the judgment. The jurisdiction of the circuit court was claimed (1) because the requisite diversity of citizenship existed and (2) because the suit was ancillary to the original action at law. The plaintiff's bill did not disclose the existence of a federal question. All of the defendants who now are appellees in this court claimed by demurrer, and one of them claimed also by answer, that

the court was deprived of power to entertain the bill by the provisions of the last clause of the seventh amendment to the constitution, reading as follows: "And no fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rules of the common law." The appellees insisted upon this objection in the court below and are doing so here, pages 51 to 61 of their brief being devoted to its discussion. The decision of the district judge upon the constitutional question was in favor of the appellant; but his decision upon the case as a whole was adverse to the appellant, in so far as its claim against the appellees was concerned.

Section 5 of the act of 1891 provides that an appeal may be taken from the circuit court direct to this court "in any case that involves the construction or application of the Constitution of the United States." The clause could not have been framed more broadly; and if it is to be construed in accordance with the natural import of the language employed, it is quite obvious that the present case falls within its bounds, for undoubtedly this is a case that involves both the construction and the application of the constitution. In every case that has arisen heretofore, this court has given full effect to the sweeping terms found alike in the fourth, fifth and sixth clauses of section 5.

It has been held repeatedly that the whole case, and not merely the constitutional question, comes here for review, even though that question affect only a small part of the recovery sought: Field v. Barber Asphalt Co., 194 U. S. 618, and cases there cited; Iowa Life Insurance Co. v. Lewis, 187 U. S. 335. It makes no difference which party injects the constitutional question into the dispute, nor is it essential that its presence appear upon the face of the pleadings; it is sufficient that it be really and substantially involved in the case, no matter how or at what stage of the proceedings it gets there. For instance, in Loeb v. Trustees of Columbia Township, 179 U. S. 472, it was raised by a general demurrer to the plaintiff's petition, one of the grounds of the de-

murrer being that a state statute relied upon by the plaintiff contravened the due process of law clause of the fourteenth amendment.

It is of no importance whether the right claimed under the constitution be granted or denied. In Iowa Life Insurance Co. v. Lewis, it was denied, and the party claiming it brought the case up. In Loeb v. Trustees of Columbia Township, it was granted, and the party against whom it was claimed brought the case up. In Holder v. Aultman, 169 U. S. 81, there was a writ of error direct to this court because of the claim made in the circuit court that a certain Michigan statute was violative of the constitution. Mr. Justice Gray said: "Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case." The decision of the circuit court was based partly, and that of this court was based wholly, upon reasons that were independent of the constitutional question.

It is contended that the existence of the constitutional question furnishes no ground for a direct appeal to this court upon the part of the appellant, because the determination of that question in the court below was in its favor. The decree was in favor of the appellees, and they had no occasion to appeal; but if upon the other issues of law the district judge had adhered to the opinions entertained by him when he overruled the demurrers, it would have been against the appellees. Certainly they would have had the right then to invoke the jurisdiction of this court. Now, there is nothing in the act to indicate that Congress intended to make the jurisdiction of this court depend upon the question whether the circuit court decided all issues of law, or any particular issue of law, in favor of the appellees. It cannot be that if one party is defeated in a suit the appeal shall be to

this court, and if the other party is defeated the appeal shall be to the court at New Orleans. The constitutional question was involved in the case in the court below, and is involved in it here. The appellees will have the full benefit of their contention on that subject, just as they would have had if the district judge had decided it in their favor (in which event the situation would have been precisely as it was in Loeb v. Trustees of Columbia Township), or if the final decree had been against them and they were appealing. It was the manifest purpose of Congress that in all such cases the party who had to do the appealing should be at liberty to come here with his record. We think the reasoning of Mr. Justice Harlan in the Loeb case is pertinent to the matter now under consideration. The italics in the following quotation from his opinion are ours.

"The circuit court of appeals act does not declare that the final judgment in a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, *and that claim is sustained or rejected*, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment *at the instance of the unsuccessful party whether plaintiff or defendant*. It was the purpose of Congress to give opportunity to *an unsuccessful litigant* to come to this court directly from the circuit court *in every case* in which a claim is made that a state law is in contravention of the Constitution of the United States. If the circuit court had adjudged in this case that the township's claim of unconstitutionality was without merit and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the circuit court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the state law upon which his action depended was, upon his adversary's claim, stricken

down as void under the Constitution of the United States? *Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of Congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff?* The answer to these questions has already been indicated."

We think, however, that in Field v. Barber Asphalt Co., 194 U. S. 618, the question now under consideration was determined. In that case, Field brought a suit in equity against the asphalt company, to have declared void certain tax bills issued against his property. He urged several objections to the tax bills, some of which were based upon constitutional grounds, and some not. The circuit court held against him on the federal questions, but for other reasons granted a portion of the relief for which he had prayed. The decree therefore was not satisfactory in all things to either party; and both appealed to this court. Field moved to dismiss the appeal of the asphalt company, upon the ground that its appeal should have gone to the circuit court of appeals because the decision of the constitutional questions had been favorable to it, and it could not found the right of a direct appeal to this court upon the determination of a constitutional question in its own favor. This is precisely the position taken by the appellees in the case at bar. The motion was denied. After citing several cases to the effect that in a direct appeal because of the existence of a constitutional question the whole case comes up, Mr. Justice Day said:

"If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed."

In one of their arguments on the motion (page 16 of the argument in the yellow cover), the appellees say:

"Another ground exists for denying that the federal question is involved, if the construction of the seventh amendment is, as appellant contends for in its brief on the merits herein. It urges in its brief, that the seventh amendment applies solely to appellate courts and not to the power of the circuit courts, and says that the question has been a settled one in this court for almost a century. Appellant's brief, p. 68 et seq. Crim v. Handley, 94 U. S. 652. If this court has settled the question, or if the provision itself is clearly applicable to appellate procedure, then in no true sense was the constitution involved when appellees raised the point below. We do not agree with appellant, that the question of jurisdiction suggested by the application of the seventh amendment is a settled question; but if it is settled then it is not a question."

In other words, the appellees appear to make the somewhat startling suggestion that the constitutional question which they urged with so great a show of confidence in the court below, and to which they devote several pages of their brief in this court, and concerning which they assume that this court will adopt their contention (Brief, 55), is a frivolous question, and therefore cannot serve as the basis of jurisdiction for a direct appeal. We do not believe that the appellees can be heard to say that the question which they themselves are pressing upon the attention of the court is frivolous; they are estopped from assuming such a position. But a question of jurisdiction is one which the court raises for itself, without awaiting the movement of parties litigant; and we suppose that the solution of the inquiry whether a certain proposition should be deemed frivolous in this connection, would depend to some extent upon the good or bad faith of the person advancing it. Therefore we may be permitted to say that the appellees mistake in thinking that we claim that the field of operation of the seventh amendment is confined to the appellate courts, and that we assert that the question now raised has been a settled one in this

court for almost a century. We do not make either of these contentions, or believe in the correctness of either of them. We think that the appellees are wrong in their opinion that the federal courts have not the same power as other courts of chancery to review judgments at law for fraud practiced in their procurement. But we do not think that the question is a frivolous one, and we do not believe that the appellees have acted otherwise than in good faith in presenting it for decision. The attention given to it by both parties demonstrates that they have regarded it as a real question; and as such we have no doubt the court will treat it, in so far as its bearing upon the matter of jurisdiction is concerned.

2.

It remains to inquire whether, assuming that the present case is within the terms of the fourth clause of section 5 of the act of 1891, there is any extraneous reason why that clause should not be controlling.

It is contended for the appellees that the constitutional question involved in this litigation is also a jurisdictional question, and that therefore the effect of its presence is measured solely by the first clause of section 5. That clause permits a direct appeal to this court "in any case in which the jurisdiction of the court is in issue," and provides that "in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Our answer to this proposition is short.

If, as we have endeavored to show, the case comes fairly within the provisions of the fourth clause, and if, as counsel for the appellees claim, it comes within those of the first clause, we perceive no reason why the appellant should not have the right to elect under which clause it would proceed. Certainly it is the general rule that whenever by statute, contract, or otherwise, a person comes into the possession of two rights which cannot be enjoyed concurrently, it is his

privilege to choose between them. The application of this principle to the selection of tribunals is a thing of daily occurrence. If a citizen of New York wishes to sue a citizen of Pennsylvania for $5,000, he may file his complaint in either the state court or the federal; and it is for him, and not for the defendant, to pick the court. If a defendant in a circuit or district court deny the jurisdiction of the court, and, his contention on that subject having been overruled, he be defeated upon the merits of the case, it will be for him, and not for the appellee, to say whether he will abandon everything except the jurisdictional question and bring that directly here, or will take his entire case to the circuit court of appeals.

We cannot find anything in the act of 1891 which indicates an intention that the first clause of section 5 should be superior to the fourth clause, and should exclude the application of the latter to cases falling within the terms of both. They appear to be coördinate clauses, whose fields of operation overlap in spots though separate in the main. The questions which may be raised in regard to the jurisdiction of a court are multitudinous, and few of them involve the construction or application of the constitution. Whether there has been due service of process, whether the defendant is suable in the district in which the action was brought, whether there is diversity of citizenship, whether the amount in controversy is sufficient, whether the cause of action is separable,—these and a hundred other subjects not affected by any constitutional provision may come into dispute as questions of jurisdiction. Ordinarily such inquiries are of a purely preliminary nature, and require for their proper answering no investigation into the merits of a cause. For this reason, no doubt, it was provided that in such cases only the jurisdictional question should be certified to this court. But as a general rule, constitutional questions are of deeper import, and cannot be disposed of without considering the whole case. Therefore it was enacted that whenever such

a question was involved this court should have, and should pass upon, the entire record. The present case is of that character; the constitutional question permeates the whole controversy. The seventh amendment must be construed, and as construed the extent of its application to the case must be determined by an examination of all the record.

This leads us to another suggestion. Thus far, we have considered the matter as if the constitutional question here involved were strictly one of jurisdiction; and in our original brief we spoke of it as such, having then no occasion to draw any distinctions with reference to it. But is it really so? The inhibition against re-examining facts tried by a jury must of necessity have some limit. Is the verdict of the jury to the effect that Hunter died in 1896 to be taken as settling that question irretrievably for every litigation between the parties and privies, wherein it may constitute a collateral issue? Even if the circuit court sitting in equity were forbidden to re-examine that question as a main and fundamental issue, and to hold that the policies of insurance never became matured demands against the company, would it follow of necessity that it could not take cognizance of the indubitable fact that Hunter still lives, as a mere link in the chain of proof that the judgment was obtained by fraud? It seems to us that it would not. If not, then the constitutional question is not one of primary jurisdiction, but one of the extent to which the court will go in granting relief. While we do not think that such a solution of the problem would be correct, it appears to us conceivable that the seventh amendment might be construed in such manner, and be applied in such manner to the facts of this case, that the court would restrain the use of the judgment at law as a defense because of the fraud practiced in its procurement, and then remit the appellant to the various state courts for the recovery of its money by actions for money had and received. If such might be the result, the question presented by the appellees is not one naturally and properly covered by the

first clause of section 5. Much less is it one which must be determined under the provisions of that clause to the exclusion of another of at least equal dignity, which appears undoubtedly to be applicable to the situation.

Respectfully submitted,

MAURICE E. LOCKE,
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APRIL 26, 1906.

(18,274)

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1908.

No. [redacted]25

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY,
Appellant,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

ALEXANDER & THOMPSON,
MCLAURIN & WOZENCRAFT,
SPOONTS, THOMPSON & HARWISE,
ETHERIDGE & BAKER,
Solicitors For Appellees.

19,771

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INTRODUCTORY.

To present fairly the position of the parties to the record an outline must be given of the genesis and subsequent history of the controversy involved. This outline naturally divides itself into two parts: First, an action at law finally determined and the judgment discharged; and second, a suit in equity brought after the disposition of the law action to retry the same issues.

The essential facts in the controversy in the action at law and the suit in equity were identical, except that the bill in the latter case relates in part to incidents subsequent to the termination of the former action.

I.

THE LAW ACTION.

William A. Hunter, the assured under policies of life insurance aggregating $15,000 in favor of his sister, Mrs. Jennie M. Mettler, disappeared in December, 1896. The circumstances surrounding his disappearance indicated that he had been accidentally drowned in the Pecos river. No eye witness to the drowning was available. The insurance company having denied liability, because of its belief that Hunter was not dead, but had conspired with his sister to defraud it, Mrs. Mettler instituted an action upon the policies, relying upon circumstantial evidence, and upon her own testimony of innocence to meet the position of the company, and in July, 1900, she prevailed on a trial of said action in the Circuit Court of the United States, and recovered a judgment, which was by this Court affirmed, (Fidelity Mutual Life Association v. Mettler, 185 U. S., 308). Upon mandate being issued to the Circuit Court, and without waiting for the actual issuance of execution or the levy of same upon its property, if, indeed, it had any property within the jurisdiction of the Circuit Court for the Northern District of Texas, the Insurance Company on June 2, 1902, voluntarily paid into the registry of the Court the amount of the judgment against it, and costs of suit. Thereupon, by direction of Mrs. Mettler and her leading counsel, William H. Clark, said fund was distributed by the Clerk, as will be hereinafter described, and the law case was at an end.

II.

THE SUIT IN EQUITY.

In May, 1903, the Insurance Company having in the meantime changed its name to that indicated in the present record, filed a bill in equity in the Circuit Court of the United States for the Northern District of Texas against Mrs. Mettler, who, in the meantime, had become the wife of a Mr. Smythe, and against William H. Clark, Morris A. Spoonts, Charles A. Culberson, all of whom had been attorneys for Mrs. Smythe in the law case, and against the Phillips Investment Company, a creditor corporation of William H. Clark, which had received payment of a debt due it by said Clark out of his portion of the proceeds of the settlement by the Insurance Company of the judgment in the action at law. The object of the bill was to reclaim from the parties named the monies which had been paid by the insurance company in satisfaction of the law judgment, and, as preliminary to that relief, an injunction was sought, restraining the defendants named from setting up as a defense to the proceeding the judgment in the law action. The theory of the bill was that William A. Hunter was not in fact dead; that many of the circumstances tending to show that he had died at the time and under the circumstances shown in the law action were manufactured in pursuance of a conspiracy between Hunter and his sister, in order that she might collect his insurance money from the insurance company; and that the result was to give his disappearance a false color, and thereby enable Mrs. Smythe to prevail in the law action. *The attorneys in the case and the Phillips Investment Company, who are appellees in the present proceeding, were expressly exonerated from all guilty knowledge of or participation in the fraud of Mrs. Smythe, and they were sought to be held solely because they had received some of the monies paid on*

the judgment. On the hearing of this suit, the Circuit Judge awarded the Insurance Company the relief prayed against Mrs. Smythe, finding that Hunter was not dead, but living, and that Mrs. Smythe had conspired with him, as charged in the bill; but denied the relief prayed against the other respondents, acquitting them of all blame in the transactions under review. Being dissatisfied with that result, the insurance company prosecutes this appeal. It is to be noted that Complainant did not seek restitution from Mrs. Smythe of all the monies paid by it under the law judgment, but demanded of her simply that portion of the proceeds, which remained after her attorneys fees had been discharged, and its demand against the present appellees was in like manner restricted to the amounts which they had severally received. The bill, therefore, presented two distinct demands: One against Mrs. Smythe for monies fraudulently obtained; the other against the present respondents for monies honestly obtained, but alleged to be tainted by the circumstance that the judgment under which the funds were paid was obtained in part by the perjury of Mrs. Smythe.

THE DEVELOPMENT OF THE EQUITY SUIT.

The complainant has set out in its brief the bill of complaint as finally amended. The history of the steps taken to develop the bill to its final form is significant. The original bill of complaint was filed May 19, 1903. In that pleading, the complainant alleges in substance the issuance of the insurance policies upon the life of William A. Hunter, his disappearance, the belief indulged in by the pleader that the procurement of the policies and the disappearance of Hunter was the result of a conspiracy between Hunter and Mrs. Smythe to defraud it. It is alleged that upon Hunter's disappearance, Mrs. Smythe actively set about creating false appearances supporting the theory of his death by drowning, by causing

searches to be made, by pretending to discover accidentally the existence of the policies of complainant, by laboring studiously to manufacture a family repute of his death, and this, in the face of the knowledge, which complainant avers she possessed, that her brother was not dead, as was evidenced by her maintaining a regular correspondence with him during the pendency of the litigation; the case against Mrs. Smythe being summed up at page 6 of the Printed Record, in the conclusions of the pleader, as follows:

> "That she actively and diligently aided him in planning and carrying out said fraudulent scheme and concealing himself from the plaintiff, and that both by deliberate concealment and by direct perjury, she withheld from the Court the true facts as the same were known to her, and prevented the plaintiff from procuring evidence to sustain its defense."

Its excuses for not defeating the action at law consist of a reiteration of the conclusions theretofore advanced, to the effect, that, although the pleader was in the law action convinced that Hunter was living, yet its strenuous efforts for three years to secure credible evidence of such fact, were rendered abortive by the concealment and perjuries of Mrs. Smythe.

It is averred, however, that the pleader had secured additional proof of the fact that William A. Hunter survived his pretended disappearance, and that at the date of exhibiting said original bill, he was alive and confined in jail in Alabama upon a charge of swindling preferred against him by complainant, and that such fact, if it could have been proved in the law action would have offered a complete defense to that proceeding. That complainant did not discover "said fact" until ten months after the law judgment had been fully paid and discharged. It is not explained what is meant by the term "said fact." Evidently, it could not refer to his being confined in the Alabama jail, and with equal certainty, it may be

said, that it could not refer to the non-discovery by the plaintiff of the fact that Hunter was not drowned in the Pecos river, the entire bill showing that it had from the beginning adhered to the opinion that he was not so lost.

The bill, as against Mrs. Smythe, was plainly based upon the affirmative charge against her, that she had procured the law judgment by her own perjury, and by her corrupt use of manufactured evidences tending to show that her brother was dead. No claim is made in the bill, that Mrs. Smythe had done complainant any injury, except negatively, by concealing from it evidence, which, if produced, would have sustained its defense, and affirmatively, by production of her own perjured testimony.

As against the present respondents, no allegations of fraud or concealment or perjury were made, nor was the claim even made of any imputation of notice of Mrs. Smythe's fraud. It was charged simply, that she had employed as her attorneys William L. Hall and the law firm of Alexander, Clark & Thompson, and in consideration of their engagement to render professional services in prosecuting suit upon the insurance policies, she had assigned and transferred to them an interest in her claim to the extent of one-third of whatever might be recovered, plus $2,500, and such additional amount as might be allowed by the Court trying the cause, as attorneys' fees under the provisions of applicable Texas Statutes. It was alleged that afterwards William H. Clark, by written transfers, acquired the interests of his partners, Alexander & Thompson, and of William L. Hall, and that having in the meantime, under a right reserved in his contract of employment, to secure additional associate counsel, he had employed Morris A. Spoonts and Charles A. Culberson, who had rendered professional services in said litigation under such employment, and that further, the said Clark, being indebted to the Phillips Investment Company, has assigned to that respondent his entire

remaining interest in the judgment, as collateral security for his promissory note to it in the principal sum of $1,471.57, and it concludes with the recital, that these respondents severally pretend that they acquired their several interests in the law judgment for a valuable consideration paid in good faith and without notice, that William A. Hunter did not die, as alleged by Mrs. Smythe in the law action, and by way of a traverse of such alleged pretensions of these respondents, "charges the truth to be as follows:" proceding in such amendment to say, that complainant, in its defense of the law action, made its denial of the death of Hunter its leading defense, and by its pleadings therein filed had propounded such denial, and so had given notice of its rights and defenses to all persons dealing with said action or the matters therein litigated, and that these respondents, at the time of acquiring their respective interests in the premises, had actual knowledge of the contention made by the present complainant. It further charges that the respondents parted with no new or valuable considerations in obtaining the several payments made them, but accepted same in discharge of antecedent indebtedness. The additional averment was made, as against Mr. Culberson, that besides being advised, through complainant's pleadings in the law action, that Hunter had not died, as alleged, he further knew that said complaint was assigning as error in this court the refusal of the trial judge to direct a verdict in the law action in complainant's favor, upon the ground that no evidence had been adduced showing Hunter's death, and that on the contrary, the evidence adduced showed that in fact he was not dead; and that Culberson had, when he accepted his alleged assignment, actual notice of this plaintiff's rights and defenses. The amendment concludes with the averment that complainant had always denied the death of Hunter, as alleged in the law action, and had always availed itself of every legal method of enforcing such

denial, and that the several respondents took with knowledge and notice of such position of the present complainant.

The gist of the amendment was the charge that these respondents took, with imputed notice of the fact, that Hunter was not in fact dead and of Mrs. Smyth's fraud.

The demurrers being renewed by these respondents (Rec. 38-42), were by the Court overruled, as against the amended bill. This action must evidently have rested upon the attempt of the complainant to allege a case of constructive notice to these respondents of the fraud of their co-respondent Mrs. Smythe. We believe this action of the Honorable Circuit Court must have been the result of the repeated allegation by the complainant in the amendments to the bill by way of conclusion, that respondents took with notice of Mrs. Smythe's fraud. Such averment, while manifestly not justified by the facts detailed, must have influenced the Court to accord undue weight to the actual facts alleged. This belief is justified by the statement in the finding of the trial court, dismissing the bill as to these respondents, which will be hereinafter referred to.

The demurrers having been overruled, the respondents filed their several answers herein, after which the complainant again amended its original bill, by filing what it styles its second amendment (Rec. 73), elaborating its allegations, purporting to constitute the respondents Spoonts and Culberson assignees of the judgment in favor ofMrs. Smythe, and reiterating its averments of actual notice of the respondents of the several rights and defenses of the complainant as defendant in the law action. This last amendment, when analyzed, is found to add nothing to the allegations of facts constituting notice to the respondents, but abounds, as do its predecessors, with conclusions of the pleader, to the effect that the respondents had such actual and imputed notice of complainant's rights and defenses.

For a clear understanding of the position of the parties, it is proper to state in this connection, that after exhausting itself to make out a case against these respondents, in accordance with the theory of the amendments to its original bill of complaint, the complainant was driven to fall back upon substantially the same position taken by it when the trial court sustained demurrers to its original bill; and at p. 100 of its brief in this case it expressly confesses that fact in these words:

> "In all that they did relative to the prosecution of Mrs. Smythe's suit against the insurance company and in accepting compensation therefor, Messrs. Clark, Spoonts and Culberson were acting in entire good faith, believing that Hunter was dead, and that their client had a legitimate cause of action. The appellant never has alleged or attempted to prove anything to the contrary of this."

This declaration exonerates the Phillips Investment Company as well, who show their entire good faith, and moreover, whose rights being derived from Clark, are unimpeachable, if Mr. Clark's position is sustained.

ANSWER OF WILLIAM H. CLARK.

The answer filed by the respondent, William H. Clark, omiting the formal parts thereof, is as follows (Rec. p. 58):

II.

This defendant says that he is, and was, a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination, confederacy or conspiracy wherewith he is

charged, or sought to be charged, prejudicial or affected by allegation or imputation, implication, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is, and was, a stranger and without any information or knowledge as to any, all and singular, the matters and things, set forth in said bill of complaint, and the amendment thereto, occurring or existing prior to the time the said Fidelity Mutual Life Association of Philadelphia, declined to pay its said policies to said Jennie M. Mettler, on the ground that her proofs of death insufficiently showed the death of said William A. Hunter; and is and was in no wise a party to any and every pretended or supposed wrongful, fraudulent, speculative, commercial or improper motive, purpose, acting, combination or confederacy, heretofore or thereafter charged in said bill and the amendment thereto against him; that this defendant was wholly without notice giving him actual or constructive knowledge thereof, and therefore this defendant leaves the plaintiff to make such proof thereof as it may be able to produce, without this: That this defendant, on to-wit: October 27th, 1897, the time of his employment as attorney as aforesaid, was residing in Dallas, Dallas County, Texas, and was an attorney at law, profitably and exclusively engaged in the active practice and business of said profession, having practiced law in Dallas since 1885. That this defendant was wholly unacquainted with Jennie M. Mettler, and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case prior to his being solicited and requested to institute suit for her against said Fidelity Mutual Life Association upon its said policies.

That R. D. Gage, then and now an attorney at law and

banker, of Pecos City, Texas, of excellent and reputable standing, and a most — citizen, and personally and well and long known to this defendant as a gentleman of the highest integrity and superior intelligence and education, acting for and in behalf of the said Jennie M. Mettler, prior to the making of said power of attorney of October 27th, 1897, referred to by plaintiff,—informed and advised this defendant of the circumstantial evidence Mrs. Mettler had in support of her said claim—being substantially that introduced in evidence by her upon the subsequent trial of her said suit, and solicited and requested this defendant to institute suit for her against said association, at Dallas, Texas, assuring this defendant that he, the said Gage, believed that said William A. Hunter was drowned as averred by Mrs. Mettler; that he was acquainted with both of them, and that they were honorable, intelligent and respectable citizens, and that, in his opinion, the said Mrs. Mettler was urging her claim in good faith; and this defendant, believing in, and then and now having the utmost confidence in the good faith of the said Gage in any representations, statements and assurances made by him to this defendant in such a matter, this defendant accepted said employment from Mrs. Mettler, for and in the name of his said law firm, after consulting with his said partners, W. M. Alexander and W. L. Hall, in reference thereto, they agreeing with this defendant that the employment should be accepted; and thereupon said power of attorney of October 27th, 1897, was made.

That said R. D. Gage first suggested and advised that said suit be brought for Mrs. Mettler at Dallas, Texas, for the reason that said Fidelity Mutual Life Association of Philadelphia had no agent upon which service could be made in Reeves county, Texas, of which county said Pecos City was the county seat, preventing the institution of the suit at Mrs. Mettler's home, to-wit, at said Pecos City, Texas; and as she

had to bring the suit away from home, and as it would be adjudicated in the Federal court, on account of the Fidelity Mutual Life Association being a foreign corporation, he, the said Gage, advised and she, the said Mrs. Mettler, desired and decided to institute her said suit at Dallas, Texas, for the recovery of said policies, without being influenced so to do by this defendant or his said law partners.

IV.

This defendant says that it is true that on or about October 27th, 1897, Jennie M. Mettler employed said Alexander, Clark & Hall, to institute and prosecute her said suit against said Fidelity Mutual Life Association of Philadelphia upon said policies of insurance; and agreed to give them for their legal services a contingent fee of one-third of whatever sum might be recovered by suit or compromise; and thereafter, on, to-wit, October 27th, 1897, entered into a written power of attorney and contract of that date, embracing therein, among other things, said power of attorney and agreement. That thereafter, on or about June 10th, 1899, said law firm of Alexander, Clark & Hall, having been, by mutual consent, dissolved, and the firm of Alexander, Clark & Thompson formed, she entered into a like power of attorney and contract with Alexander, Clark & Thompson and W. L. Hall, in lieu of and in substitution of the former, the latter being the same as the former, except in this, it provided for the employment of associate counsel by her said attorneys, and gave to them in addition to said one-third of whatever might be recovered, the further contingent sum of $2500.00, and whatever statutory attorney's fees that might be recovered, out of which her said attorneys were to pay said associate counsel; and on, to-wit, said 10th day of June, 1899, entered into another written power of attorney and contract of that date, embracing therein, said power of attorney and new contract aforesaid, in lieu

of and in substitution of said former written power of attorney and contract.

Defendant avers that the said Mrs. Mettler was a widow, and poor and wholly unable and without the funds, and unable to procure the funds to pay her said attorneys a reasonable fee for their legal services to be rendered, otherwise than by a contingent fee out of whatever she might recover. That said first and second contracts were merely intended to provide for said employment and said contingent fee,—which was a very usual and proper contingent fee in cases such as hers, involving the contest of a close and doubtful case through the Supreme Court of the United States—the principal doubt being whether her testimony, said circumstantial evidence, was sufficient to establish her cause of action by a preponderance of the evidence; and this defendant expressly denies that he, or his said firms, speculated or traded in any manner whatsoever in or pertaining to said cause of action or said suit of said Jennie M. Mettler, or acquired any interest therein other than their said contingent fee; or that they or either of them, instigated, instituted or prosecuted said action for the common benefit of said Jennie M. Mettler and themselves, or either of them; but avers the truth to be that he and his said partners entered in said attorneys' contract, and instituted and prosecuted said suit in the exercise of his and their proper and lawful functions as attorneys at law, and in so doing acted in good faith, and for the honest purpose of protecting the interest of their client, the said Jennie M. Mettler, and not for any purpose of speculation or trade, as alleged by plaintiff. That, under and by virtue of the law in this State, as established by the Supreme Court of Texas, this defendant and his said partners were lawfully authorized to make said contract as attorneys for said contingent fee, without becoming parties to the suit or parties in interest, and without being held responsible for the duties and liabilities

resting upon their said client, the litigant; and are in nowise responsible or chargeable with the fraud of their client, if any, for that they merely entered into said contract of employment and obtained and treated said written attorneys' contracts as private and confidential papers between client and attorneys; and kept said attorneys' contracts with their private papers until the end of the litigation, and then filed the same in the court merely as evidence for the clerk of the court at Dallas, Texas, of authority from their client, who was absent at her father's home at Homer, Ohio, to collect and disburse for her the check given by the plaintiff to said clerk for her; and avers that all he did was strictly in line of his duty as attorney for the said Jennie M. Mettler, and that he is in nowise chargeable with or liable for her wrongful acts, if any.

V.

This defendant says that it is not true, as alleged in section 7½ on page 3 of the amendment to plaintiff's bill, that this defendant received his said fee of $8,346.00 solely by reason of and in pursuance of said two attorneys' contracts; but avers the truth to be, which plaintiff knew, or easily could have learned, that this defendant, in addition to giving Mrs. Mettler therefor his faithful and laborious professional services in said case for a period of about five years,—for which alone said fee would have been in nowise excessive, he also gave to said Alexander & Thompson for their interest in said contingent fee about $1100.00, on or about January 1st, 1900, prior to the rendition of said judgment in July, 1900; and gave said W. L. Hall about $900.00 for his interest therein, after the rendition of said judgment and before its affirmance by the United States Supreme Court.

That on or about January 1st, 1900, said firm of Alexander, Clark & Thompson was, by mutual consent, dissolved,

as aforesaid; and in an amicable, proper and just division of the business and fees of the firm, this defendant, who had been given said Mettler case in the division of the business, gave to said Alexander & Thompson, his one-third interest in certain fees in fire insurance cases of the firm, said fees being of the reasonable value of about $1100.00,—the business of the fire insurance companies owing said fees to said firm having gone to said Alexander & Thompson in said division of said partnership business.

That upon the dissolution of said firm of Alexander, Clark & Hall, on or about January 1st, 1899, said Hall retained his connection with said Mettler case and his interest in said contingent fee—and so retained the same until after the trial and the rendition of said judgment therein; and thereafter, in consideration of two certain lots owned by this defendant in South Dallas, and in consideration of being relieved of the preparation of said cause for trial in the Supreme Court of the United States, he gave this defendant his interest in said judgment. That in pursuance of this settlement this defendant afterwards conveyed said two lots to said Hall, the same being then of the reasonable value of about $900.00.

That, while it is true, as alleged on page 6 of plaintiff's bill, that said W. M. Alexander, William Thompson and W. L. Hall assigned and transferred in writing on May 29th, 1902, after the affirmance in said judgment, by endorsement thereon, all their interest in said contracts of employment of October 27th, 1897, and of June 10th, 1899,—such endorsements were then made for said consideration already received by them as aforesaid.

That this defendant in so purchasing said interest of his former partners in said contingent fee did not do so as a speculation or investment, but properly did so in order to have an adjustment and settlement of their partnership business, which was mutually desirable, their relationship as partners

having ceased. All of which this defendant did because of his confidence in the justness of said cause.

That this defendant so parted with his said years of professional services and with about $2000.00 in said fire insurance fees and said two lots without any fault on his part, and in an honest and faithful effort to do his duty in the due course of his professional work, to his client and his former partners.

This defendant says that it is not true, as alleged in plaintiff's bill on page 9, that the legal services of the defendant Morris A. Spoonts and Charles A. Culberson were rendered in consideration of this defendant assigning and transferring to the former an interest of $1500.00 and to the latter an interest of $1026.00 in this defendant's said attorney's contracts; but avers the truth to be, that in May, 1899, this defendant employed said Spoonts, as was necessary and proper, to assist him in the conduct of said suit, in the trial court, and in 1901 employed said Culberson to assist him in the conduct of said cause in the Supreme Court of the United States, and agreed to pay, and did pay, said Spoonts for the legal services so rendered by him said proper and reasonable fee of $1500.00, and agreed to pay, and did pay, said Culberson on account of the legal services so rendered by him, in part payment of such services, the sum of $500.00, and $26.00 for the printing of briefs at Washington, paid for by him—and in addition thereto, he, the said Culberson, was paid for his legal services, by the said Jennie M. Mettler, as she agreed to do at the time he was employed, the further sum of $500.00; that his said fee of $1000.00 was proper and reasonable compensation for the legal services so rendered by him. That in associating said Spoonts and said Culberson with him in said cause, as aforesaid, this defendant acted strictly in the line of his functions and duty as an attorney at law, and only did what is usual and proper under such circumstances.

VI.

This defendant says that said two contracts of said Jennie M. Mettler for a contingent fee, the first with Alexander, Clark & Hall, and the second with Alexander, Clark & Thompson and W. L. Hall, cannot, and never could be made the basis to constitute any claim for or against any one herein, for that the second contract undertook to deprive said Jennie M. Mettler of the power to compromise her said cause of action, and to end the litigation, and is therefore null and void; and the first contract was canceled and revoked and abandoned by the parties thereto before the rendition of said judgment.

VII.

This defendant says that the said judgment in favor of Mrs. Mettler and against the plaintiff, was rendered on the 4th day of July, 1900, for the sum of $21,550.00, with interest thereon at the rate of six per cent. per annum from and after said date, and costs of suit. That the amount of said judgment was made up as follows: $15,000.00 allowed as the face of said three policies, $2,250.00 allowed as legal interest on the policies, $1,800.00 allowed as statutory damages and $2,500.00 allowed as statutory attorneys' fees. That said cause was carried by said defendant to the Supreme Court of the United States, and heard at its October term, 1901, and on May 5th, 1902, the judgment of this court was affirmed by the Supreme Court.

That on, to-wit, June 3rd, 1902, the Fidelity Mutual Life Insurance Company, before said judgment had become collectable,—no mandate having been returned from the Supreme Court to the trial court, and not being returned until June 17th, 1902, and prior to the issuance of execution, and before execution could have issued,—did voluntarily pay to

J. H. Finks, the clerk of this court, for said Jennie M. Mettler, in satisfaction of her said judgment, principal and interest, to-wit, $24,028.25.

This defendant says that on said June 3rd, 1902, the Fidelity Mutual Life Insurance Company gave to J. H. Finks, clerk of this court, its check, payable to his order, on the Exchange National Bank of Dallas, for said sum of $24,028.25, in full satisfaction of said judgment, and said clerk endorsed said check and deposited it in the American National Bank, of Dallas, in his name, for the use and benefit of said Jennie M. Mettler, and in this way the bank became indebted to said Clark, for the use and benefit of said Jennie M. Mettler, in said sum. That on or about said 3rd day of June, 1902, said Jennie M. Mettler, then being at her father's home, at Homer, Ohio, by and through her duly authorized attorney, this defendant, William H. Clark, collected the said sum of $24,028.25 from said clerk, by his certain checks drawn on said American National Bank, in accordance with her order and request, by and through her said duly authorized attorney, acting under her instructions, as follows, to-wit: To said Jennie M. Mettler, through her attorney, William H. Clark, $11,616; to William H. Clark, $8,346.00; to Morris A. Spoonts, $1,500.00; to Charles A. Culberson, $1,026.00; and to the Phillips Investment Company, $1,540.25. That this settlement with the clerk was the equivalent of, and intended as, the paying by him to said Jennie M. Mettler of said $24,028.25, and she paying to the defendant Charles A. Culberson said $500.00; and to the defendant William H. Clark, $11,912.25, and his paying to the defendant Morris A. Spoonts $1,500.00 and to the defendant Phillips Investment Company $1,540.25, and to the defendant Culberson $526.00 in accordance with the lawful, just and fair understanding and agreement between the parties. That said checks were issued by the clerk directly to said parties, at the

request of the defendant William H. Clark, for the amounts due them respectively, in order to simplify the transaction.

That this defendant, acting as her attorney, under and by virtue of authority from her, the said Jennie M. Mettler, collected her said $11,616.00 check from the said American National Bank, and, upon instructions thereafter received from her, remitted same to her at Homer, Ohio, by New York exchange on the 23rd day of June, 1902; and collected his said $8,346.00 check from said American National Bank, and deposited the money in the National Bank of Commerce, of Dallas, to his account—and afterwards drew checks thereon, in favor of various and sundry creditors of his, to the full amount thereof and now has no part thereof, or any property, real, personal or mixed, into which, or on account of which the same was, or is, invested or spent—all of which he is ready to verify. That said other checks the clerk, properly and lawfully, as heretofore set out, delivered to the parties, or their duly authorized attorneys, and the same were paid in due course by the American National Bank. That the clerk's said check to the Phillips Investment Company was given at the request of this defendant, in satisfaction of this defendant's indebtedness to it, in the sum of said check. That in disbursing said $24,028.25 for said Jennie M. Mettler, according to her wishes and instructions, and in receiving said check for $8,246.00 and collecting same for himself, this defendant had no knowledge, information or suspicion that said W. A. Hunter was not in fact dead; nor that said suit was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds, by said Jennie M. Mettler—if such be true in reference to her; nor that any fact alleged or proven, by or for said Jennie M. Mettler was false or fictitious, if such be true; nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demand, other

than was produced at the trial of said cause, and shown by the record thereof on appeal, and known alike to the twelve jurors who rendered the verdict, and the judges of the Supreme Court who were of the opinion that the evidence sustained the verdict, and affirmed it; and this defendant has done nothing in the institution or prosecution of said action at law, or in disbursing, as aforesaid, the $24,028.25 paid by the plaintiff's check to the clerk for said Jennie M. Mettler, except what was clearly his right and duty as one of her legal representatives, and having acted in the due course of his professional business, he is not liable to the plaintiff, even should said Jennie M. Mettler be found guilty of the wrongs charged against her.

VIII.

That said Alexander, Clark & Hall, having full confidence in the sincerity and good faith of their client, the said Jennie M. Mettler, in the matter of her claim against said Fidelity Mutual Life Association of Philadelphia, at her instance and request, under and by virtue of their said employment as her attorneys, acting in due course of their professional duties and powers, did institute for her, on, to-wit, January 8th, 1898, her said suit against said Fidelity Mutual Life Association of Philadelphia, in the district court of Dallas county, for the 44th judicial district of Texas; and said suit was removed by the defendant therein to the circuit court of the United States for the northern district of Texas, at Dallas; but this defendant, nor none of said attorneys for Mrs. Mettler, attempted to push said suit to an early trial, but were all and each of them willing to continue the case by consent from term to term, in order to give the defendant any and all reasonable time in which to satisfy itself of the death of said William A. Hunter,—which said attorneys never doubted, and so advised the attorneys representing said Fidelity Mutual

Life Association in said suit,—all of which was done with the full knowledge and approval of the said Jennie M. Mettler; but the defendant, to the contrary, insisted upon and urged for an early trial of said suit, and opposed plaintiff's application for a continuance, and forced plaintiff to trial against her will, at the time of the trial and rendition of judgment in her favor.

IX.

This defendant says that he had no notice which gave him actual, implied or constructive knowledge that said W. A. Hunter was not dead; that this defendant is informed & believes & so avers that the plaintiff, upon receiving notice of the death of W. A. Hunter from Mrs. Mettler, sent its duly authorized agent and representative R. C. Milliken, to said Pecos city, Texas, in January, 1897,—who, upon arriving there, with her permission, undertook for her the preparing and having made and executed the affidavits of the proofs of death, and did obtain many such affidavits of the proofs of death, which he stated to Mrs. Mettler were satisfactory and sufficient—and yet, on or about the next day did return to see her, and stated in substance that he considered it his duty to tell her, before leaving, that he was satisfied the said W. A. Hunter, her brother, was not dead; and before leaving Pecos city he caused a telegram to be sent him at Pecos city, from the State office of the plaintiff, at Dallas Texas, to the effect that her said brother had been arrested and was then being brought to Pecos city, and showed said telegram to her, and threatened to send her and her brother to the penitentiary unless she would cancel and surrender said policies to him, in which event he promised that neither she nor her brother would be prosecuted, and that he would have her brother released from arrest. That while this defendant was informed of and had notice of this, the first claim of the plaintiff that

said Hunter was not dead, before the institution of said Mettler case, and that soon after the departure of said Milliken from Pecos city the plaintiff herein, by the letter of its president from its home office in Philadelphia, wrote Mrs. Mettler refusing to pay the policies, on the ground that plaintiff did not believe that her brother was dead; and while plaintiff did reiterate this as the reason why it should not be required to pay said policies in the court proceedings in said Mettler case, —yet, its conduct had been such as to cause this defendant to have no confidence in its good faith therein; and this defendant had no reason or cause whatever to doubt the good faith of Mrs. Mettler; and this defendant thought that plaintiff refused to pay said policies because it believed that the circumstantial evidence which Mrs. Mettler had to establish the death of her brother, the same as disclosed by said affidavits and proofs of death prepared by said Milliken, and the same as was introduced in evidence upon the trial of said Mettler case,—was insufficient evidence to support a verdict in her favor, rather than it believed said Hunter had not been drowned and was not in fact dead. And this defendant says he did know that said fact was a material issue in said suit, tried, contested and decided in favor of said Jennie M. Mettler and against plaintiff herein, upon sufficient proof, circumstance- and other facts; and that, by a verdict of the jury upon said issue and by the approval thereof and judgment thereon by this court in said cause, the fact that said W. A. Hunter was then dead, and was before the filing of said action at law,—was legally proven and established by competent evidence in the mode and manner recognized and provided by law; and the court having full jurisdiction, all further doubt, dispute, controversy and contention as to that fact and as to the liability of the plaintiff to pay to said Jennie M. Mettler the amount so found and adjudicated, were forever ended and solemnly adjudicated, and in all things finally af-

firmed by the Supreme Court of the United States; and thereafter by plaintiff herein recognized and observed; and knowingly and intentionally paying by its check, to the clerk of said court, for said Jennie M. Mettler, or her order, the amount so adjudged to be recovered by her, the validity and justness of said finding, verdict and judgment was no longer questioned, denied or disputed by plaintiff herein, nor open to such dispute; and was acquiesced in by plaintiff by its voluntarily, on, to-wit, June 3rd, 1902, before the return of the mandate from the Supreme Court of the United States to this court, on June 17th, 1902, and before execution issued or could have issued, on said judgment, paying off and satisfying said judgment as aforesaid; and not until about one year after this defendant had received in the manner heretofore stated, relying upon the validity of said judgment, said $8,346.00, and had expended said money so collected by him in due course of business, did plaintiff intimate or assert that said W. A. Hunter was not in fact dead, or that said judgment or its payment was wrongfully or fraudulently obtained and not acquiesced in by it. This defendant says that said verdict of the jury and said judgment determining said issue cannot now be annulled or set aside, nor said issue of law or fact be again tried, retried or re-contested in this court, as plaintiff is attempting to do herein: and that plaintiff is now estopped from denying the validity of said judgment; and that its remedy, if any it has, is against those persons guilty of such fraud or wrong, if there be such persons, and not this defendant; and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant,—an innocent taker, in good faith, for value, in due course of his professional business, from the hand of said clerk, acting for said Jennie M. Mettler, without notice of any fraud or wrong done or intended toward plaintiff, or any equity in plaintiff herein, and after solemn adjudication of said controverted issues and facts.

X.

This defendant says that he is, and was, a stranger to and without knowledge of the supposed conspiracy and fraud between said Jennie M. Mettler and said W. A. Hunter,—and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; and this defendant says that, as to the written contracts between said Jennie M. Mettler and Alexander, Clark & Hall, Clark & Hall, and Alexander, Clark & Thompson and W. L. Hall, if it be held that said contracts are and were valid, existing contracts,—in this event, defendant says that both of said contracts have long since been performed; and that said attorneys at law, and each of them, in good faith and without intention, purpose or knowledge of any wrong or fraud toward plaintiff herein, in due course of their professional function, became and were innocent purchasers for value of said interest in said policies or judgment, or money; and without intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if there was in fact such by said W. A. Hunter and Jennie M. Mettler, or either of them,—which is not admitted but denied; and without any knowledge that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony on the trial of said cause were false or fictitious. And this defendant says that the assignment of an interest in said policies judgment and recovery, for and upon consideration of the contractual undertaking of said attorneys to render and perform in the future certain necessary legal services for the recovery and collection of said policies,—and which services so undertaken, said attorneys were bound to and did render in payment for said property interest, in good faith and without notice of any wrong intended or done plaintiff,—constituted such attorney or attorneys and each of them innocent purchasers for value, in good faith, without notice of any equity of

plaintiff and created in this defendant an equity and title in and to the money so received by him, superior in all things to the pretended equity of the plaintiff; and this defendant in taking payment of his own demand from said Jennie M. Mettler, in the manner heretofore stated, took it free from any taint of wrong or equity of the plaintiff and by a right and title in all things superior thereto.

XI.

And this defendant denies all and all manner of unlawful combination and confederacy, or knowledge, implied or actual, thereof, wherewith he is by the said bill and amendment thereto charged, or that is sought to be established to his prejudice, without this—that there is no other matter, cause or thing in said plaintiff's said bill and amendment thereto contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant,—all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court may direct; and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

WILLIAM H. CLARK, Defendant.

McLAUREN & WOZENCRAFT,
Solicitors for Defendant, William H. Clark.

ANSWER OF MORRIS A. SPOONTS.

The answer of respondent, Morris A. Spoonts, omitting the formal parts, is as follows, (Rec. p. 47):

II.

This defendant says that he is and was a stranger to all

and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters and things set forth in said bill of complaint, occurring or existing prior to, to-wit: May 1, 1899, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this;

That this defendant, on to-wit: May 1st, 1899, was residing in Fort Worth, Tarrant county, Texas, and was an attorney at law profitably engaged in the active business and practice of said profession, and wholly unacquainted with said Jennie M. Mettler and with the litigation and controversies between her and plaintiff herein, and the merits and facts of the case. That on or about May 1st, 1899, he was in due course of his professional business at attorney at law, consulted and employed by Wm. H. Clarke, one of the defendants herein, to assist him, the said Clarke, in the presentation and trial before said circuit court, of said action at law, then depending, brought by said Jennie M. Mettler against plaintiff herein to recover on said policies, and so in general way, and from an inspection of the pleadings and testimony in

said case, became informed of the issues of law and fact to be so presented and tried in said action and court, and that the right of Jennie M. Mettler to recover was independent upon proving indirectly by facts and circumstances the death of W. A. Hunter prior to the filing of said suit, there being no person having nor claiming to have personal knowledge of his death, which fact of death was disputed and denied by plaintiff herein, then in that action defending. That Wm. H. Clarke was a reputable person and an attorney at law of good professional ability, character and long and honorable standing. That it is and was not unusual, in the practice of the profession, for an attorney at law to consult with and employ some other attorney at law to assist him in the presentation and trial of important cases, nor for such attorney, when so consulted and employed, to appear and represent professionally the client of the attorney so employing him without objection; and this defendant, so employed by said Clarke, did assist him in the trial of said action at law and in the presentation thereof to the court and jury, in consideration of which professional services by this defendant so rendered at the instance and request and for the benefit of said Clarke; he charged and said Clarke paid to this defendant therefor the reasonable sum of fifteen hundred ($1,500.00) dollars; that as a means of making such payment, and in discharge of the personal obligation of said Clarke so to do, and for no other purpose, said Clarke requested the clerk of said court wherein said suit was presented and tried, and services and judgment rendered, to pay to this defendant said sum, which payment said clerk did make by means of his personal check or draft upon the American National Bank of Dallas, about June 3rd, 1902, in favor of this defendant, or order for said sum, which check or draft was not presented for payment nor collected by this defendant, but was by this defendant in due course

and usage of commercial business indorsed in blank and sold and delivered to the Fort Worth National Bank, of Fort Worth, Texas, who was then and there lawfully engaged in such banking business, and became the owner thereof, and the amount thereof was by it placed to the credit of this defendant as a money deposit in said bank, subject to be and was checked out by this defendant and his check paid by said bank in due course of such business. That during all said time and transactions there was no contract relations express nor implied existing between this defendant and said Jennie M. Mettler, plaintiff in said action at law, and no confidential fiduciary or other relation existing between them, and this defendant had no other or further relation or connection with said action at law, nor with the facts nor matters in controversy, than said professional assistance and service so rendered for said Clark, and had no knowledge, information, belief nor suspicion that said W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand, with an honest purpose and intent, upon lawful and just grounds; nor that any fact, alleged or proven, by or for said Jennie M. Mettler, in said action at law was false or fictitious, nor that any witness or testimony in her behalf was perjured, false or untrue, nor of any facts or circumstances, reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor other than was produced at the trial of said cause and then equally known to plaintiff herein. That whether the fifteen hundred ($1,500.00) dollars alleged to have been paid to this defendant was in fact ultimately or actually paid from money of plaintiff herein, provided for the purpose, this defendant had and has no knowledge nor information except from the allegations of plaintiff's bill, and therefore leaves plaintiff to make such proof as it may be able to produce as to that fact.

IV.

This defendant says that if it be true, as alleged by plaintiff, that it deposited with the clerk of the court, in which said action at law was tried and judgment rendered, money sufficient and with the purpose and direction to pay and satisfy in full said judgment and costs in favor of Jennie M. Mettler, and that said judgment was wrongfully obtained and that fifteen hundred ($1,500.00) dollars of said deposited money was paid by said clerk to or by direction of Wm. H. Clarke or Jennie M. Mettler to or for the benefit of this defendant, nevertheless, said judgment was a record contract obligation of the highest dignity, as evidenced, importing verity and binding upon plaintiff herein until annulled by payment or judicial action; that plaintiff herein paid and performed said judgment obligation in money and intended so to do; and the clerk of said court and said Jennie M. Mettler and said Wm. H. Clarke, having received said money as payment, and having paid it out as current money and lawful medium of exchange in payment or discharge of their several obligations and duties, and by direction and consent of plaintiff, the legal title to said money vested in those to whom it was so paid in due course of business dealing, who took it without notice of the wrong or fraud perpetrated on plaintiff, if any there was perpetrated, which is not admitted, and such innocent takers of the legal title and possession, including this defendant, cannot in equity nor good conscience be required to refund said money, nor to account to plaintiff therefor in this suit.

V.

This defendant says that he is not, and was not, as alleged or implied in plaintiff's bill, an assignee of said policies or judgment or contract, nor of any part thereof, nor of all or

any part of any claim or demand or chose in action or contract right or contingent interest in them, nor of any recovery, and while he may have believed that Wm. H. Clarke had an interest in the said policies or judgment or proceeds thereof, when collected, and that said Clarke was paying or intending to pay his said obligations to this defendant from the proceeds of the payment of said judgment, this defendant took it from and as the money of Clarke, in payment of the debt obligation of Clarke for legal service of that value rendered by this defendant to said Clarke, and released Clarke from all and further obligations in due course of business and not as a payment of said judgment or any part thereof or interest therein, and this defendant says that plaintiff intended to discharge its apparent legal duty and obligation to Jennie M. Mettler, and to satisfy said judgment by payment with money, and that the same should be current money free from all equities and further control of plaintiff.

VI.

This defendant says that he did have notice that plaintiff herein as defendant in said action at law, denied that said W. A. Hunter was dead, and that said fact was a material issue in said action at law, tried, contested and decided in favor of said Jennie M. Mettler and against plaintiff herein upon sufficient proof of circumstances and other facts, and that a verdict of the jury upon said issue and by the approval thereof and judgment thereon by said court in said action at law, the fact that said W. A. Hunter was then dead and was before the filing of said action at law, was legally proven and established by competent evidence in the mode and manner recognized and provided by law in that court having full jurisdiction, and all further doubts, disputes, controversy and contention as to that fact and as to the liability of this plaintiff to pay to said Jennie M. Mettler in current money the

amount so there found and adjudged was forever ended and solemnly adjudicated, and in all things finally affirmed by the Supreme Court of the United States, and afterwards by plaintiff herein recognized, observed, obeyed and knowingly and intentionally paid in money to said Jennie M. Mettler or her order, the amount of money so adjudged to be recovered by her. That the validity and justness of said finding, verdict and judgment was no longer questioned, denied nor disputed by plaintiff herein, nor open to such dispute, and not until long after this defendant had received from said Clarke payment for said professional services at the time and manner above set forth and had expended the same in due course of business after plaintiff claim, intimate or assert that W. A. Hunter was not, in fact, dead, nor the said judgment or its payment was wrongfully or fraudulently obtained. This defendant says that said verdict of the jury and said judgment determining said issue, cannot now be annulled nor set aside, nor said issues of law or fact again tried, retried or contested in this court, and that plaintiff's remedy, if any it has, is full and adequate at law in damages for the wrong done it, if any was in fact done, in obtaining said judgment and payment against those persons guilty of such fraud or wrong, and that no trust or duty to account or restore said money to plaintiff in this suit exists or can be imposed upon this defendant an innocent taker in good faith for value in due course of business from the hand of said Clarke without notice of any fraud or wrong done or intended toward plaintiff, or in any equity of plaintiff therein, and after solemn adjudication of said controverted issues and facts.

VII.

This defendant says that he is and was a stranger to and without knowlelge or information of the supposed contracts and dealings between Jennie M. Mettler and Alexander, Clarke

and Hall, and between said Alexander and Clarke, and between said Hall and Clarke, and between Jennie M. Mettler and Clarke, and between plaintiff and W. A. Hunter, and therefore leaves plaintiff to make such proof in regard thereto as it may be able to produce; without this, that if it be true that such supposed contract exists, and existed at the alleged dates thereof, this defendant believes, and has reason to believe, that the same have all been fully performed, and that said Clarke and Alexander and Hall, acted as attorneys at law in good faith and without intention, purpose or notice of any wrong or fraud toward the plaintiff herein, and that said Clarke became and was an innocent purchaser for value and good faith of such interest in said policies or judgment or money, and without notice or intention of any fraud, deceit or wrong contemplated, done or intended toward plaintiff, if any there was in fact by said W. A. Hunter and Jennie M. Mettler or either of them which is not admitted but denied, and without any knowledge, notice or information that W. A. Hunter was not in fact dead, or that any of the allegations, issues or testimony in the trial of said action at law were false or fictitious.

This defendant says, from information derived from the allegations of plaintiff's bill, that the assignment of an interest in said policies, judgment and recovery for and upon the consideration of the contractual undertaking of said attorney, or attorneys, to render and perform in the future certain necessary and legal professional services in the recovery and collection of said money judgment, and which service so undertaken said attorneys were bound to, and did render in payment for such property interest in good faith, without notice of any wrong intended or done plaintiff, constituted such attorney or attorneys, an innocent purchaser for value in good faith, without notice of any equity of plaintiff, and created in said Wm. H. Clarke an equity and title in and to the

money so recovered and paid, superior in all things to the pretended equity of plaintiff, and this defendant, in taking payment of his own demand from said Clarke, took it free from any taint of wrong or equity of plaintiff, and by a right and title in all things superior.

VIII.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, or that is sought to be established to his prejudice without this, that there is any other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

MORRIS A. SPOONTS, Defendant.

STANLEY, SPOONTS & THOMPSON,
Solicitors for said Defendant.

ANSWER OF SENATOR CULBERSON.

The answer of respondent, Senator Culberson, omitting the formal parts, is as follows, (Rec. p. 69):

II.

This defendant says that he is and was a stranger to all and singular the matters and things in the said plaintiff's bill of complaint set forth and contained in paragraphs numbered 2, 3 and 4, and is without knowledge or information as to the

truth thereof, and therefore leaves the plaintiff to make such proof thereof as it shall be able to procure; without this, that this defendant denies all and all manner of fraud and unlawful combination and confederacy wherewith he is charged, or sought to be charged, prejudiced or affected by implications, imputation, construction or otherwise, and says that he is wholly and particularly innocent and not guilty thereof.

III.

This defendant says that he is and was a stranger and without knowledge or information as to all and singular the matters and things set forth in said bill of complaint occurring or existing prior to the 30th day of December, A. D. 1901, and to any and every supposed wrongful, fraudulent or improper motive, purpose, acting, combination or conspiracy charged in said bill, and therefore leaves plaintiff to make such proof as it may be able to produce without this:

That this defendant, on to-wit, December 30th, A .D. 1901, being a citizen of the State of Texas, was temporarily residing in the city of Washington, in the District of Columbia, and was then and there an attorney at law, duly licensed as such by the honorable, the Supreme Court of the United States. That upon the last named date, the said judgment in favor of Jennie M. Mettler as plaintiff and against the complainant herein, was then pending in the Supreme Court of the United States, and the said Jennie M. Mettler and the said William H. Clark, desiring the services of this defendant in the matter of the briefing and oral presentation of said case to the Supreme Court of the United States, did contract with this defendant, as follows, to-wit:

"In the Supreme Court of the United States.

FIDELITY MUTUAL LIFE ASS'N OF PHILADELPHIA

vs.

JENNIE M. METTLER.

Writ of Error from United States Circuit Court at Dallas.

This agreement witnesseth: Whereas, Jennie M. Mettler, as plaintiff, recovered judgment against the Fidelity Mutual Life Ass'n of Philadelphia in the above entitled cause, as fully appears from the record of the suit; and,

Whereas a writ of error has been taken from the judgment of the court below, at Dallas, Texas, to the Supreme Court of the United States at Washington, by said company, and the cause is yet to be briefed and submitted in the Supreme Court for the said Mrs. Mettler, as well as said insurance company;

Premises considered, we, the said Mrs. Jennie M. Mettler, a *femme sole*, and W. A. Clark, her attorney, the owners of said judgment, hereby employ Chas. A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the Supreme Court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Chas. A. Culberson an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that the payment of said fee is contingent upon a recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of said Mrs. Jennie M. Mettler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said W. H. Clark therein, and that the one is not to be responsible for the portion to be paid by the other; that is each one undertakes to pay said Chas. A. Culberson five hundred dollars, as aforesaid.

Witness our hands, this 30th day of December, A. D. 1901, at Dallas, Texas.

MRS. JENNIE M. METTLER,
JENNIE M. METTLER,
By WM. H. CLARK, Her Attorney.
WM. H. CLARK.

HOMER, OHIO, LICKING CO., January 7th, 1902.

I do hereby certify that the above named Mrs. Jennie M. Mettler appeared before me and acknowledged the signing of this instrument to be her voluntary act and deed.

J. S. WILLIAMS, J. P."

That in pursuance of such contract, this defendant did prepare and assist in the preparation of the briefs filed in the said cause in the Supreme Court of the United States, and did present said cause to the Supreme Court of the United States on oral argument, and that the amount contracted to be paid this defendant by the said Jennie M. Mettler and the said William H. Clark was a reasonable, usual and customary charge. That on June 3, 1902, the clerk of this court drew his check No. 426 in favor of this defendant for $1026.00, said check being drawn on the American National Bank of Dallas. That said check was in payment of the aforesaid fee of $1000.00 earned by this defendant, and to reimburse him in the sum of $26.00 for necessary and proper disbursements made by him, and that this defendant endorsed said check to the National Exchange Bank of Dallas, which bank paid same on June 12, 1902, to this defendant by giving him credit therefor, and this defendant checked said money out of said National Exchange Bank of Dallas and used the same and is not now nor was he at the time of the filing of the original bill herein the owner of any of said money.

IV.

This defendant further avers that he was not present at, nor did he participate in, the trial of said cause in the court below; that he had no connection whatever therewith, until the record thereof was perfected and filed with the clerk of the Supreme Court of the United States. That he had no knowledge, information, belief or suspicion that W. A. Hunter was not in fact dead, nor that said action at law was not brought and prosecuted in good faith for an honest demand,

with an honest purpose and intent upon lawful and just grounds, nor that any facts alleged or proven by or for said Jennie M. Mettler in said action at law, were false or fictitious, nor that any witness or testimony in her behalf was perjured, false or untrue; nor of any facts or circumstances reasonably calculated to arouse doubt or suspicion of the justness of her demands, nor other than produced at the trial of said cause, and then equally known to the plaintiff herein. That, upon the contrary, when said record was examined for the first time by this defendant, it appeared therefrom that the issue had been tried, submitted to a jury and that the jury had returned a verdict to the effect that W. A. Hunter was dead, that the trial court affirmed the verdict and entered a judgment in all things in accordance therewith, and that thereafter the trial court overruled the motion of complainant herein for a new trial therein, and thereby sanctioned in all things the correctness and justness of the verdict so rendered, and that the only connection this defendant had with said cause was to assist in the preparation of the brief upon and to orally present on behalf of said Jennie M. Mettler to the Supreme Court of the United States the legal questions arising on the face of the record.

V.

This defendant further avers that the trial of the issue by the jury in the action at law mentioned in complainant's original bill of complaint cannot now be questioned, tried, retried, annulled, set aside, nor inquired into, in that the queston of whether or not W. A. Hunter was dead was tried by a jury and such question cannot be tried in this proceeding, in that this proceeding is in opposition to the provisions of the 7th amendment to the Constitution of the United States, and all of this defendant is ready to verify.

VI.

And this defendant denies all and singular and all manner of unlawful combination and conspiracy wherewith he is by said bill charged or that is sought to be established to his prejudice, without this, there is no other matter, cause or thing in said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court may direct, and humbly prays to be hence dismissed with his reasonable cost and charges in this behalf most wrongfully sustained.

C. A. CULBERSON, Defendant.

F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for the Defendant, Charles A. Culberson.

ANSWER OF THE PHILLIPS INVESTMENT COMPANY.

The answer of the respondent, Phillips Investment Company, omiting the formal parts, is as follows, (Rec. p. 52):

The defendant, Phillips Investment Company, now and at all times hereinafter saving and reserving to itself all manner of benefit and advantage of exception and demurrer to the many errors and insufficiencies in complainant's original bill of complaint contained and the amendment thereto, and for answer thereunto or unto so much and to such facts thereof as this defendant is advised is material for it to make answer unto, answers and says:

This defendant admits that it, the Phillips Investment

Company, is a private corporation duly incorporated by the State of Missouri, long prior to October 29, 1901.

This defendant admits the allegation contained in subdivision 4 in paragraph 6 of plaintiff's bill.

Defendant denies the allegation in subdivision 5 of paragraph 6 of the bill to the effect that the clerk of said circuit court on June 3, 1902, paid out to the defendant, Phillips Investment Company, the sum of fifteen hundred and forty and 25-100 dollars, but says that the facts with respect to said payment are more accurately set out in the amended bill.

That as to each and all of the other averments contained in plaintiff's bill, this defendant says that it can neither affirm nor deny the same, for the reason that it is not advised of the truth or lack of truth in the said averments contained; but this defendant says that its knowledge and connection with the subject matter is truthfully and fully set forth hereinafter in its special plea and answer.

This defendant admits the averments contained in plaintiff's first amendment to its original bill, in the paragrph marked "7 1-2," to this extent alone, namely, that its connection with the subject matter of the litigation, which was remote, as hereinafter more particularly set forth in its special answer, has been characterized by the utmost good faith and without notice of the fact that one William A. Hunter was connected with the subject matter of such litigation, and without knowledge of the issues involved.

This defendant disclaims any knowledge of the matters further contained in said paragraph 7 1-2 of plaintiff's first amendment of its original bill of complaint, and says that it can neither affirm or deny the truth of the allegations, except with respect to the following pertaining to this defendant.

Defendant says that the averments in said amendment of plaintiff's original bill, as follows:

"The sum of fifteen hundred forty and 25-100 dollars, re-

ceived by Phillips Investment Company, as set forth in section 6 of this bill, was paid to it by the clerk of the court by means of his check No. 424 for fifteen hundred forty and 25-100 dollars, drawn June 3, 1902, on the American National Bank of Dallas, Phillips Investment Company endorsed said check and transferred the same to the Bank of Montreal, which endorsed the same and transferred it to the Fourth Street National Bank of Philadelphia, which, in turn, endorsed the same and transferred it to the City National Bank of Dallas, and to said bank it was paid June 16, 1902, through the Dallas Clearing House by the American National Bank of Dallas. Said payment was made to said Phillips Investment Company by reason of and in pursuance of the assignment described in the fourth paragraph of section 6, of this bill. By said assignment under date of October 29, 1901, William H. Clarke, assigned and transferred to Phillips Investment Company all his interest in the cause of action and judgment in said cause of Jennie M. Mettler against this plaintiff, describing the same as follows: 'All my right, title and interest, that is my contingent attorney's fees of about $8000.00, in the cause of action and judgment of about $21,500.000 rendered thereon on the 4th day of July, 1900, in the United States Circuit Court of the Northern District of Texas, at Dallas, in the life insurance case of Jennie M. Mettler vs. Fidelity Mutual Life Association of Philadelphia, numbered 2118, said judgment rendered as aforesaid, in favor of Mrs. Jennie M. Mettler, and against said association, from which judgment a writ of error is now pending in the Supreme Court of the United States.' Said assignment was given as collateral security for a certain promissory note, dated October 29, 1901, whereby said William H. Clark promised to pay said Phillips Investment Company, on or before March 1, 1902, the principal sum of fourteen hundred seventy-one and 57-100 dollars, together with interest thereon at the rate of 8 per centum per

annum from date, such interest to be paid semi-annually, and each installment thereof to bear interest at the rate of 10 per centum per annum from its maturity. Said note was given for pre-existing indebtedness. Said assignment was filed with the clerk of the court December 2, 1901, when said assignment was given and accepted, and when it was filed in the circuit court, said cause was pending in the Supreme Court, to which the plaintiff had removed it by a writ of error filed September 1, 1900. At said time also the judgment in said cause had been suspended by a supersedeas bond filed by this plaintiff September 1, 1900," are true, but do not contain all the material facts which sustain the meritorious defense on the part of this defendant, and which are more particularly set out hereinafter.

This defendant especially denies the allegations in plaintiff's said amended bill, as follows:

"In accepting such assignment of such cause of action and such suspended judgment, Phillips Investment Company was bound to take notice of the rights and defenses of this plaintiff, as disclosed by the record in said cause. Moreover, this plaintiff has reason to believe, and does believe, and so alleges that in accepting said assignment Phillips Investment Company was acting under advice of attorneys, the aforesaid William M. Alexander, and William Thompson, then doing business as co-partners under the firm name of Alexander & Thompson. Said Alexander & Thompson when they advised Phillips Investment Company to take such assignment had actual knowledge, as aforesaid, that this plaintiff by its pleadings filed in said cause, denied that William A. Hunter had died as alleged. This plaintiff further has reason to believe, and does believe, and so alleges, that aside from the knowledge of its said attorneys, Phillips Investment Company had actual knowledge when it accepted said assignment of the fact that the principal issue involved in said litigation was that of

the alleged death of said William A. Hunter, and that this plaintiff denied that he had died as alleged. Sometimes, however, Phillips Investment Company pretends that it can disregard said assignment and rest its rights upon the check given it by the clerk of the court, as aforesaid, and upon its surrender of said note in exchange therefor. As to this plaintiff avers the truth to be, that said check was given solely and because of and in pursuance of said assignment. And, further, it avers that in accepting such check and surrendering such note Phillips Investment Company was represented by, and acted only through, its said atorneys, Alexander & Thompson; and that they then and there had full knowledge of the main issue involved in said litigation, and knew that the plaintiff had always denied that William A. Hunter had died, as alleged, and had always availed itself of every legal method of enforcing such denial. This plaintiff further avers the truth to be that Phillips Investment Company parted with no new and valuable consideration in exchange for check, but accepted the same in discharge of antecedent indebtedness."

For further and special answer, and in addition to those allegations contained in plaintiff's amended bill which are expressly admited herein, this defendant says that William H. Clark, one of the defendants in this cause, was, in October, 1901, indebted to this defendant in a sum of between $1300 and $1400, which was evidenced by his promissory note that at the solicitation of William H. Clark this defendant gave him an extension for the time of payment of said note, in consideration of which the said William H. Clark executed a written transfer as collateral security wherein he conveyed his interest in the subject matter of the judgment in the cause of Jennie M. Mettler v. Fidelity Mutual Life Association of Philadelphia.

This defendant says that it was advised at the time that an appeal was pending from said judgment, and that the cause

was to be heard and determined finally by the Supreme Court of the United States. But this defendant says that it parted with nothing of value to it, by reason of the security afforded it in the transfer of the interest of said Clark in said judgment, other than the extension of the time of maturity of said note.

This defendant says that it did not investigate into the merits of said cause and did not become cognizant of the issues involved in said cause. Defendant says that the said William H. Clark had previously been its attorney for many years in connection with W. M. Alexander, and that it was content to deal with said William H. Clark without employing an attorney to represent its interests in connection with said security.

Defendant says that it retained the said note, secured, as aforesaid, by the transfer of the interests of William H. Clark in said judgment.

That afterwards, to-wit, in May, 1902, the clerk of the Circuit Court of the United States for the Northern District of Texas, at Dallas, communicated notice to it, through Alexander & Thompson, that it would, under the orders of the court, pay the amount of said note held by it against William H. Clark, upon the surrender of said note. This defendant says that thereupon it mailed from Kansas City to Alexander & Thompson, at Dallas, Texas, the note of William H. Clark, as aforesaid, amounting, principal and interest to $1540.25, and did a few days thereafter receive a check drawn by the clerk of said court, in manner and form as set out in plaintiff's amended bill.

This defendant says that it is informed, believes and so alleges that the said note executed by William H. Clark, and mailed by this defendant to Alexander & Thompson, was surrendered to the clerk of the court, and was, under the orders of the court, cancelled and surrendered by the clerk of the court to William H. Clark.

This defendant says, furthermore, that it is informed, believes and so alleges, that the said William H. Clark was, during the months of May and June, 1902, possessed of large funds, and was amply able to pay said note, and would have paid the same on presentation, and said note would have been presented to him and would have been paid to this defendant, except upon the notification by the clerk of said court that he was ready to pay the same upon presentation to him.

This defendant says that it would not have made surrender of said note to the clerk of the court, except upon the belief that this honorable Court, in disbursing the fund in question, would protect this defendant, which parted with the possession of the note only upon the consideration of the payment being made to it, and defendant relied in good faith upon the power and duty of the court to protect it under the circumstances.

And this defendant says that without default or neglect on its part, but upon the reliance on its part in the conclusive finality of the judgment of the Supreme Court of the United States, which judgment had been voluntarily paid by the plaintiff, so this defendant alleges on information and belief, and upon the faith in this honorable Court in distributing the fund, and calling upon this defendant for the surrender of the note, this defendant pleads that it is entitled to the protection of the court.

Defendant says, furthermore, that it is advised, believes and so alleges that the said William H. Clark is now unable to pay the amount of said note, and defendant has long since parted with the possession of said note, which was surrendered, as aforesaid, by the clerk of the court and cancelled, and the circumstances will not admit of this defendant being restored to the position that it was at the time it was invited, as aforesaid, to surrender, and did surrender, its evidence of indebtedness into the custody of the court.

This defendant specially denies that it had any knowledge

prior to the institution of this suit, of the issues involved in said cause, and it denies that it had parted with any material consideration, or would have done anything to affect its status by virtue of said assignment, as a creditor of said William H. Clark's, except to extend the time of payment of said note.

This defendant says that it parted with the possession of said note upon the faith in the virtue of the final judgment in said cause, and upon faith in the virtue of the orders of this court in directing payment to it of the amount of the note and interest, and upon the surrender of the note and the cancellation of the same; and this defendant did and performed these acts without notice, but as a stranger to the merits of the said cause; wherefore, it says that in good conscience and equity it is entitled to the protection of the court as against the claim of plaintiff.

This defendant says that such action as was taken in its behalf by Alexander & Thompson was purely gratuitous, and did not involve the relations of attorney and client. This defendant says that the said Alexander & Thompson advised this defendant that they could not act as attorneys adversely to the said William H. Clark, who had previously been associated with them as a partner for years; and defendant says that there was no occasion for it to invoke the services of attorneys, but that it dealt directly with William H. Clark with respect to the subject matter, and such services as were rendered by Alexander & Thompson, as above stated, were gratuitous, not those of attorney to client, and not of an advisory character.

All of which matters and things this defendant is ready to aver, maintain and prove, as this honorable Court shall direct, and hereby prays that it be discharged hence with its reasonable costs in this behalf sustained; and defendant prays that the final decree rendered herein fully protect this defendant in all respects as should obtain under the facts in a

court of equity; and defendant prays for all relief, general and special.

(Signed) ALEXANDER & THOMPSON,
Solicitors for Defendant Phillips Investment Company.

The effect of the ruling of the trial court upon the demurrers, as well as the final disposition of the case, in so far as these respondents are concerned, was to render of no importance in the trial court their contention to the effect that under the operation of the Seventh Amendment to the Constitution of the United States, the Circuit Court was without power to grant the relief sought. The case below was disposed of on other grounds, as is manifest in the first place, by the action of the court in overruling the demurrer asserting the constitutional immunity, and in the second place by t holding of the court, that regardless of the constitutional question, the bill and brief disclosed no equity in the complainant, as against these respondents.

The opinion of the Circuit Court is reflected in the following paragraph of the reasons announced for its dismissing the bill, as against these respondents:

> "As to the defendants other than the Smythes, it is admitted by the complainant, that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance company in the suit at law. The defendants, William H. Clark, Charles A. Culberson and Morris A. Spoonts were attorneys retained by the plaintiff Jennie M. Mettler, at various stages in the suit at law to represent her before the courts in the prosecution of her claim against the insurance company. They and each of them, performed legal services for her in the prosecution of her alleged claim, and in contemplation and in consideration of such services, received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclosed with particularity the manner in which of the atorneys who are made

defendants came into possession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved, in order to show the interest and part of each under the judgment acquired, and also to show to what extetn participated in the fund. After consideration, I have reached the conclusion, that the rule enunciated and relied upon by counsel for complainant with relation to the assignment of judgments, to the effect, that the assignee of a judgment takes it subject to all equities existing between the litigants, whether it had notice of the same or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. Complainant seeks to follow the proceeds of the judgment into the hands of the parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently expended by them, and I cannot find any principle, either of law or of equity, which under the circumstances will compel restitution from them. It is true they were put on notice of complaintnt's claim in the suit at law, that Hunter was not dead, but living, but in the absence of corrupt knowledge on their part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned, that judgment, so entered, concludes the insurance company.

"The defendant, Phillips Investment Company, is in quite as favorable an attitude as any of the defendant attorneys. It innocently received an assignment of a portion of the judgment from the defendant Clark, as collateral security for the debt owing to it by him, and it participated in the fund paid into court in satisfacton of the judgment, and surrendered ts evidence of indebtedness against Clark in consideration therefor. It is quite blameless in the premises, and, as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity, which would compel the Phillips Investment Company to return what it has received under this judgment.

"The view expressed here with relation to the atitude of the defendants, other than the Smythes, should have led to

the sustaining of the demurrers interposed, and insisted upon by them. It now leads to the dismissal of the bill against them, with their costs, and the decree will so provide."

The learned counsel for the appellant in the brief filed in this cause has built up an ingenious elaboration of general rules of equity pertaining to following non negotiable property into the hands of third parties, and pertaining to the assignments, legal and equitable, of judgments at law and decrees in equity. But he has made no serious attempt to point out wherein such rules are applicable to this recovery, and he makes no serious attempt to escape the principles announced by the Circuit Court in disposing of this controversy, to-wit:

1. That the rules about assignments of judgment have no application, because this proceeding, as against these respondents, but incidentally affects the judgment, *and is substantially an attempt to follow money innocently received by these respondents and innocently disbursed.*

2. That they are purchasers for value and without notice.

3. That respondents, though put on inquiry by complainant's claim that Hunter was living, had the right to rely upon the deliberate judgment of the court to the contrary.

Complainant, while driven to the necessity of admitting that these respondents are in this matter devoid of blame, yet argues this case as if a moral question were involved, and devotes much the greater portion of its remarks to a discussion of the iniquity of their position. It cannot be that the respondents are "free of blame," "innocent," "acting in entire good faith," etc., and yet partner's in a gigantic swindle. The case is one in which, if the complainant prevails at all, it must prevail by reason of technical rules, and it labors under the necessity of showing this Court cause for giving to those technical rules a vitality superior to the acknowledged equities of

these respondents. The burden further is on it of developing a plain case for the application of these technical rules. Really it is not seeking equity, but a pound of flesh, and but for the prayer for the vacation of the law judgment, it would have no claim upon the equity jurisdiction of any court. We confidently submit, that when all of the facts are maturely considered by this Court, it will appear almost to the point of demonstration, that the leading principle upon which complainant relies has no application to this case.

Where, as in this case, the demand of the complainant is devoid of characteristic equitable features, and it comes into a court of equity solely by reason of a prayer for relief, which does not rest, as against these respondents, upon an equity, we feel free to invoke, as we do, acknowledged legal, as well as settled equitable defenses. These we will endeavor to present in the succeeding pages of this brief.

FIRST.

The Material Issues.

1. It is contended by the appellees, that the Constitution of the United States forbids the maintenance of this suit. In support of this suggestion, the Seventh Amendment is relied on, wherein it is provided: "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

2. It is urged that the bill of complaint is without equity. The particular principle relied on is, that in a court of equity where a final judgment at law is assailed, as having been obtained through fraud, it must appear as a condition precedent to the granting of the relief sought, that the fraud is in matter extrinsic and collateral to the issue in fact tried in the law action, and not in respect to a fact directly in issue in the former suit, and that the present case falls within that class where equity refuses relief.

3. It is shown that these respondents are innocent purchasers for value of all benefits which they have severally received, as the result of the successful prosecution of the law action, that they are not charged with any notice of any defects in their title to same, and that the only claim of adverse right ever brought to their attention, to-wit, the claim by the insurance company that Hunter was living, was investigated and settled adversely to the insurance company after a plenary trial and writ of error to the highest court in the land, before appellees ever accepted any benefits under their respective purchases.

4. The equities of the innocent respondents being at least equal to the equities of complainant, and their legal title having been made perfect by the voluntary payment by complainant of the valid demands they held against Mrs. Smythe, no case for restitution is shown. Especially is this the case where the innocent parties sued have innocently disposed of the property sued for before suit brought without notice of the complainants' alleged equity.

5. It being admitted that all monies paid out by the complainant were so disbursed upon a judgment of a court of competent jurisdiction, and no privity being shown between complainant and the present respondents, the complainant has no legal or equitable demand against these respondents, nor ability to make illegal now the retention by these respondents of monies which they were lawfully justified in receiving when paid.

6. The theory of the bill, as against the appellees, being that they held funds which equitably belonged to complainant, it should have been alleged in the bill and shown through the proofs, that appellees held such properties of complainant at the time it exhibited the present bill against them, and such fact not appearing, and no fraudulent disbursement by these appellees being suggested, the bill cannot be maintained.

SECOND.

The Constitutional Question.

The Seventh Amendment provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This provision finds its fullest historical exposition in the opinion rendered on behalf of this Court by Mr. Justice Gray, in Capital Traction Company v. Hof, 174 U. S., 1; but that decision does not necessarily determine in favor of the appellees the present contention. It goes far towards sustaining their position, but is not conclusive, and notwithstanding that case, it remains for this Court to answer for the first time the important query presented in this record, to-wit:

Will a Circuit Court of the United States sitting in equity and deriving its powers from the laws of the United States re-examine an issue of fact, which has been already finally determined at law after a plenary hearing before a jury, constituted in accordance with the guaranties of the Constitution of the United States, and upon such re-examination annul such decision at law, on the ground that an improper conclusion was reached, and substitute its own judgment for that of the law tribunal?

The letter of the Constitution would seem to require this question to be answered in the negative. It reads plainly that the fact tried by the jury shall not be *otherwise* re-examined *in any Court* of the United States than according to the rules of the common law. Plainly where the fact has been tried by a jury, and the same fact is brought again before an equity court of the United States for re-examination, the letter of the Constitution is violated

The answers that are offered to this statement of our position are two-fold.

First: That the quoted language of the Seventh amendment is designed to impose restriction solely upon the appellate courts of the United States in their hearing of revisory proceedings taken to reverse results attained in the trial court in jury cases; and

Second: That if the language of the Constitution be held to restrict the equity courts in a proper case, still the rule is not applicable here, because in the present case the complainant is not seeking to have equity retry the fact decided at law, but a different fact.

I.

The question of law raised by the first answer is difficult of solution. The history of the amendment, as detailed in the Hof case already referred to, shows that the people of the United States were not satisfied with the measure of power given to the courts of the United States in the original draft of the Constitution. By some it was feared that too little dignity and vitality was given to the results obtained in a jury trial. By others it was feared that the right of a jury trial in all proper cases was not sufficiently guaranteed; and by still others it was feared that the power of the appellate court was not sufficiently defined, and that in spite of the guarantees pertaining to the jury trial in the *nisi prius* courts, there was danger that the results of such trials might be disturbed by revisory tribunals.

With these ends in view, an agreement was finally reached, and finds expression in the language now under consideration. This language, we submit, should not be construed as accomplishing simply the ends which Mr. Madison had in mind, nor as accomplishing simply the suggestions of Mr. Gorham, Mr. Hamilton or any other one statesman of that epoch, nor must it be construed as simply extending the provisions of the old organic law relating to juries and the results of jury

trials. On the contrary, it should be interpreted, if its language fairly admits of such interpretation, as containing the substance of all the remedies which the people had demanded for all the existing evils.

The appellant here seeks to restrict the amendment unduly, and to treat it as applying solely to appellate procedure and as giving effect only to the views of the statesmen, who were disturbed over the power of the appellate tribunal, instead of giving it that liberal construction which constitutional provisions, especially as they appear in the Federal instrument, are usually given.

There is every reason for treating the language as applying to the action of any court of the United States, whether of law or equity, re-examining an issue of fact which has been once actually litigated before and decided by a common law jury. It is a recognized principle in our judicial history that issues of fact on all questions, except those purely technical, should be decided by juries. They have been a constituent part of our Federal courts since the organization of the government, and no disposition has been shown, either on the part of Congress or of the courts, to restrict their powers. The people, at the time of the adoption of the Constitution, were used to jury trials, and in subordinating their local governments to the national government desired chiefly to preserve to themselves, so far as their affairs might fall within the realm of the judiciary of the general government, the old fashioned mode of trial of issues of fact in law actions and criminal cases to which they were accustomed. They desired that the results of a trial by jury where there had been a real investigation of a given fact should not be frittered away, and hence the broad language of the amendment. It is matter of common knowledge, that the Constitution in its original form, would, in all likelihood, have failed to receive the approval of the necessary number of States, had it not been that

men of the highest character and eminence in the several communities assured their constituents that amendments remedying matters to which the people objected would find place in the Constitution as soon as practicable, after it went into effect.

Where the letter of the instrument itself includes the inhibition which we here invoke, and the inhibition is one which is consistent with the public history of the times and the further development of the nation, we submit, no reason is shown for limiting the provision to some one object narrower than its express language.

AUTHORITIES.

Capitol Traction Co. vs. Hof, 174 U. S., 1;
Parson vs. Bedford, 3 Peters, 433;
Chicago etc. Ry. Co. vs. Chicago, 166 U. S., 226-246;
Justices vs. Murray, 9 Wallace, 274, 277;
Dillingham vs. Hawk, 60 Fed. Rep., 494.

This construction does not interfere with the legitimate power of the equity courts. Notwithstanding a case may have been tried at law before a common law jury, the equity court still has the undoubted authority to hear objections to that judgment, which could not have been made at law, either because of their nature or because they were not brought forward on the trial of the law case on account of any accident, mistake or wrongful conduct of the successful party, which prevented the hearing at law from being a real determination of the issue apparently decided. That is, the equity court would have the power, notwithstanding the Seventh Amendment, to re-examine in a proper case an issue apparently tried before a jury at law, when it was made to appear that the jury did not really hear or pass upon the issue. If the unsuccessful party was prevented from exhibiting a defense, as by

being kept from court, or deceived as to setting, or misled into believing the facts to be different from what they really were, or was surprised, accidentally hindered—any of these circumstances might prevent the trial at law from developing the real contest on any given fact submitted to and decided by the jury. In such case, he could find relief at equity, but he could not find relief at equity when he has suffered no deceit, but has deliberately accepted trial upon a known issue, and unavailingly exhausted his resources in the common law forum. To permit such a party to retry his case before the equity court would nullify the constitutional safeguards pertaining to the common law jury.

II.

Assuming that the Court will adopt our contention, that the Constitution prohibits the re-examination of a fact actually tried at law, we will now endeavor to show that this issue tendered us in the present proceeding was actually tried at law within the meaning of the Seventh Amendment.

The controlling issue of fact in the trial of the law action was that Hunter did not lose his life, as claimed by the plaintiff, and that the appearances relied on as proof of his death, were brought about through the fraud of Hunter, participated in by the plaintiff. Many circumstances tending to show this fraud were relied on and three witnesses, who claimed to have seen Hunter alive after the date of his disappearance, as claimed by plaintiff, testified on behalf of the defendant, detailing the fact of having seen him and conversations with Hunter.

The petition upon which the law action was tried is shown at pp. 10-16 of the Record. It avers the facts essential to recovery, including the death of Hunter, and oppressive and deceitful conduct towards plaintiff on the part of the adjuster of the Insurance Company, R. C. Milliken, with reference to

the preparation and acceptance of proofs of death. The answer of the defendant, shown at p. 17 of the Record, containing a general denial, put in issue all the material facts of plaintiff's petition. The bill of exceptions in the law case affirmatively states the ultimate fact being contested in the case in the following language and may be taken as a pleading—defining the issue to be tried: "Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs are sufficient, and that the only question to be tried and involved, is the question of whether or not W. A. Hunter is dead, as claimed in the plaintiff's petition, and whether he died in the manner and form, as alleged therein." (Rec. p. 414.)

What was meant by these pleadings and the admission is shown by the testimony in the present case, as follows:

A. J. Brown, the general agent of the Insurance Company for Texas, and who issued the Hunter policies, and who still represented it when Hunter was drowned, testified, (Rec. p. 224):

"Q. It is a fact, Mr. Brown, is it not, that you believed from the time his (Hunter's) death was reported, that he was not dead, and *it was a scheme concocted to extort money?*"

A. "Yes."

Q. "When did you first have that belief?"

A. "The moment I read the telegram from the president on the 3rd day of January. These policies were delivered the 7th day of November, as well as I remember. I knew nothing about Hunter here, until the January following."

Q. "When did you suspect that he was not dead?"

A. "The moment I read that telegram. When I got that telegram, I remarked: 'We are in for it; this is a fraud'."

Q. *"You and the company acted on that idea, that it was a fraud, from the inception?"*

A. *"Yes sir."*

Q. *"Mr. R. C. Milliken, he was entrusted by the Company to investigate and ferret out, if he could, the fraud?"*

A. *"Yes sir."*

* * * * * * * *

(Rec. p. 225):

Q. "His (Milliken's) work was that of a detective undertaking to ferret out this matter?"

A. "He was inspector for the Company; his business was to inspect risks, and whenever a case that was supposed to be fraud showed up, it was his duty—his instructions were to make an investigation."

L. G. Fouse, President of the Insurance Company since 1878, testified (Rec. p. 272):

"Q. Please state at what conclusion the plaintiff company arrived as to the justness of the claim made by Mrs. Mettler, and state in a general way what efforts were made, if any, to ascertain whether, in fact, Hunter was dead, covering in your statement the period of time elapsing between the date of his disappearance on December 3, 1896, and the date of the trial of Mrs. Mettler's suit against the plaintiff, in May, 1900?

A. On receiving the proofs submitted by Mrs. Mettler, we reviewed the same carefully, and reached the conclusion that Hunter had not drowned, as alleged, because the physical conditions for such an accident were highly improbable, and the fact that the one horse was tied to a bush close to the wagon, and that the other horse was found at some distance, near a railroad station, and pased through three gates, that, according to the investigation, had been closed; and that the handbag disappeared, which he was not liable to have on his person; taking into account the climate and conditions of the weather, that instead of its being a case of accident, it was a case of disappearance. Having reached that conclusion,

we governed ourselves accordingly, and followed up every possible clue for the purpose of finding him. Among the several efforts made was one at Nashville, Tennessee, resulting from a communication received from a person by the name of D. G. Wallace, who stated that he had met Hunter in that city, and we immediately proceeded to attempt to locate him. All the hotel registers were examined and a thorough search made, but without result. As an illustration of the several efforts made, I will state, that we read in a weekly paper, published at Farmington, in New Mexico, that one W. H. Hunter had exhibited some crude oil that he obtained in a meadow. We sent an inspector to Farmington, which required a stage trip of many miles and involved a heavy expense, with the result that it was not, as we thought it might be, W. A. Hunter. The aggregate expense involved in the search was in the neighborhood of Five Thousand Dollars, without counting the salaries, which would probably increase the expenditure to twice that sum.

Q. Through what period of time did the plaintiff company prosecute its search for Mr. Hunter, or for definite and positive evidence that he was still living?

A. Beginning with the time of the submission of the proofs, notwithstanding the verdict of the jury to the contrary, we believed that he was living, and never ceased to prosecute the search until he was found."

R. C. Milliken, Inspector for the Insurance Company since prior to Hunter's disappearance, testified, (Rec., p. 231):

"Q. About how long did you continue your investigations into the question as to whether or not Hunter had died, and your efforts to obtain evidence?

A. Nearly two weeks. I think it was nearly two weeks, I worked on the case right there in the town of Pecos.

Q. Please state whether the answers given you by Mrs.

Mettler, to the questions propounded to her were faithfully recorded by you?

A. They were.

Q. *What was the substance of your report to the Company as the result of your investigations at Pecos, as to whether Mr. Hunter had been drowned?*

A. *I reported that he had not been drowned and that it was a fraud upon the Company."*

* * * * * * * *

(Rec. p. 233.):

"Q. Please state the circumstances attending the exhibition of this telegram to Mrs. Mettler as fully as you can?

A. *When I had been out there some two weeks making an investigation, I was thoroughly convinced that Hunter was alive, and that a fraud had been perpetrated on the Company I had made investigation at the ticket office, both at Pecos and at other places where tickets had been sold, and I wanted to know whether she was a party to the fraud.* I wanted to know also where he went to; which direction, which train—whether, north, east, or west—he took. I had a friend, Mr. J. J. Goode, whose name is signed to that telegram, living in El Paso—a man who once resided in Dallas, Texas, a son of the former district judge of this city. I prepared that telegram, word for word, and wrote him to send it to me at 10 o'clock sharp on January 28, 1897, and told him at that time I would be at Mrs. Mettler's boarding house, or where she was stopping—Mr. Heitman's. Before going up to Mr. Heitman's house, I went to the Western Union office in Pecos and told them that if any telegram came for me to send it up to Mr. Heitman's, that I would be up there. I went up to see and talk to Mrs. Mettler, and while talking to her the messenger boy delivered me that telegram. I paid him for it and broke it open and read it, and turned it over to Mrs.

Mettler, now Mrs. Smythe, who read it, took several minutes with her eyes fixed on the paper all the while, and finally she remarked: 'Thank God, my brother is still alive.' *I told her to give me the policies, and she told me that when her brother come she would turn them over to me.* She didn't drive me out of the house. I walked out of the house without any word from her at all."

With this opinion as to the merits of the claim of Mrs. Smythe under the insurance policies there involved, the insurance company, after making the admisison above set out on the trial of the law action, voluntarily went to trial asking no postponement, evidently confident of success, adduced a great volume of testimony, tending to show the improbability that Hunter had died as claimed, and the probability that Mrs. Smythe must know of the manufactured circumstances, and brought forward three witnesses who testified to his having survived the alleged disappearance: One who claimed to have seen him on the train passing through the State of Arkansas in the direction of Tennessee; and two who claimed to have seen him and talked with him about various matters in Nashville, Tennesse. The circumstances strongly relied on in support of its defense at law include most, if not all, of the material facts detailed in the brief of the insurance company on this appeal at pp. 34-39.

The persistence of the insurance company in its belief that it was confronted with a fraudulent claim, and the identity of the issues at law and equity, is further illustrated by an excerpt from its brief in the law action, which appears in the appendix.

The claim in the present suit and the only claim is that Hunter did not die, as claimed in plaintiff's petition in the law action, nor in the manner and form as alleged therein, but that through his fraudulent conduct, participated in by his sister, the plaintiff in the law action, she obtained a re-

covery in the law action upon inferences, properly deduced from that record, but contrary to the true facts.

To support this case in equity, the complainant has reproduced practically the identical case, as made upon the law action, makes here the same charges of conspiracy, plotting and fraud, shows that the officers of the insurance company believed the original claim to be a fraud from its inception; and produces cumulative testimony of some three or four witnesses, who claim to have discovered Hunter since the payment of the judgment in the first action, and who testified to alleged conversations with him. It also shows what has been done with the money which paid off the former judgment.

The last mentioned fact has no bearing upon any isue made in the law action, and is only material in case complainant obtains the decree which it here seeks. The first group of facts, to-wit: Those concerning the alleged discovery of Hunter, etc., are but cumulative to the testimony of the three witnesses in the law trial, who claimed to have seen Hunter after his first disappearance.

We confidently assert that the fact tried by the jury in the law case is the same fact that is now drawn in issue in this case, and that having been examined there, it is not now open to re-examination in this Court. The circumstance that evidence cumulative to that introduced in the law action is produced here cannot affect the operation of the rule.

It is as if upon the trial of an action at law to recover money, payment were pleaded, and witnesses pro and con introduced and a verdict reached, that there had been no payment. Afterwards, a receipt is discovered, or another witness to the fact of payment is found, and bill for review exhibited, in which the charge is made that further proof of payment has been discovered, and that the evidence of the witnesses for the plaintiff on the first trial was false and the non-

introduction of evidence of payment fraudulent. Plainly, the fact to be tried on the last hearing would be payment *vel non* just as on the former trial.

THIRD.

The Bill Lacks Equity.

Independent of constitutional inhibition, a Circuit Court of the United States sitting in equity will not re-examine and revise a judgment at law, *simply upon an allegation of fraud intrinsic in the law judgment.* Its jurisdiction in case of fraud is stated by this Court in many cases. The essential principles involved find embodiment in the language used by Mr. Justice Miller in United States vs. Thockmorton, 98 U. S., 61 (68):

> "The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to the fraud in the matter on which the decree was rendered. The mischief of re-trying every case in which a judgment or decree was rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

This language, giving the reasons of this Court for affirming a decree of the Circuit Court, sustaining a demurrer to the bill and dismissing it on the merits, was used where the bill sought to revise the action of the Board of Commissioners of Private Land Claims in California, and a decree of the District Court of the United States, affirming the conclusion of the commissioners on the ground that these

decrees were obtained by fraud. *The character of fraud alleged was that the prevailing party in the proceedings before the Commissioners and in the District Court sustained his title there by using documents falsely and fraudulently antedated, so as to appear to have been made at a time when the official executing them had authority to act;* it not being shown that the representatives of the government, who were opposing the relief sought by the claimant in the original proceedings before the commissioners and the District Court had assisted or connived at the fraud, or were in any respect recreant to their duty. It appeared from the history of the former proceedings, that the necessity of the claimant's exhibiting such a paper had been made obvious to the Board of Commissioners, the claimant, and the attorneys representing the government by a report of the Surveyor General, and that the attention of all the parties and of the Court was thereby drawn to a close scrutiny of any proceedings taken to supply this important document, and that after it was produced, ample time had existed before the rendition of the decrees complained of to make all neccessary inquiries into the validity of the documents.

The decision refered to, besides being commended by reason, refers with unqualified approval to an opinion delivered by Mr. Chief Justice Shaw in Green vs. Green, 2 Gray (Mass.), 361. as being the best discussion of the whole subject, and endorses particularly this language of that eminent judge:

> "The maxim that fraud vitiates every proceeding, must be taken like the other general maxims, to apply to cases where proof of fraud is admissible; but where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted."

In the Throckmorton case, the government actually be-

lieved the evidence offered by the claimant to be genuine, and made no controversy with reference to same, and its fault was that of negligence only in not raising an issue that could have been raised. But in the present case, the alleged fraud was actually tried, and the very evidence now assailed as false was fiercely attacked as false in the law action.

I.

INTRINSIC FRAUD.

The fraud alleged in the Throckmorton case was held to be intrinsic fraud, the Court saying, that the genuineness and validity of the concession to the claimant was the single question pending before the Commissioners and the Court for four years, and this was so, notwithstanding no issue on the point was in fact made. It was the thing, and the only thing, that was controverted, although the forgery was not actually suspected, and it was essential to the decree. To overrule the demurrer to this bill would be to re-try * * * the very matter which they tried on the ground of fraud in the document on which the decree was made.

An illustration of extrinsic fraud sufficient to justify an application to equity for relief is found in Pacific Railroad of Missouri vs. Missouri Pacific Railway Company, 111 U. S. 505, in which a former decree of the Circuit Court of the United States for the Eastern District of Missouri was successfully impeached and vacated upon the ground that the representatives of the unsuccessful party had been fraudulently procured by the successful parties to permit a decree to be obtained contrary to the equities of the case; that no adequate pleadings had been filed; no reference made to a Master for examination; no defense undertaken to be interposed at any stage; that the cause was hurriedly disposed of without waiting for the expiration of the usual time for taking proof,

and that the decree was collusive. Mr. Justice Blatchford delivering the opinion of this Court, citing United States vs. Throckmorton, says (p. 520):

> "On the admitted allegations of the bill there was *no real defense* made in the Ketchum suit, and the present plaintiff was prevented from making that defense by the unfaithful conduct of its solicitor, and its directors and the directors of the Atlantic Company. A case of that kind is one of which a court of equity will take cognizance."

The terms, intrinsic and extrinsic, in their present connection, are further defined and contrasted in Pico vs. Cohn, 91 Cal., 129, which is one of the most carefully considered decisions in the books on this subject: Pico owned lands in Los Angeles of great value, which were mortgaged in considerable sum. To prevent their sacrifice under foreclosure, he obtained a loan from Cohn, giving Cohn as security a mortgage, taking the form of an absolute grant of the encumbered property. Shortly therafter Pico procured necessary funds, and tendered Cohn the amount of his loan, with interest, and demanded a re-conveyance, which was refused, Cohn contending that the transaction was not a loan, but an absolute sale. Upon a suit being brought, the Court found for the plaintiff and decreed a re-conveyance upon his repaying amounts loaned. Afterwards, the Court granted a new trial, and upon the re-trial a decision was reached for the defendant and affirmed on appeal. Suit was soon afterwards brought to annul the decree last mentioned, and it was stated to have been procured by reason of the fraud of Cohn in his preparation of the form of security, and in his representation to Pico that the transaction was correct, Pico being very old and unable to speak or understand English, and unused to complicated transactions; *and in Cohn's subordination of perjury with respect to a witness named Johnson, called by the plaintiff to testify in the belief that Johnson, who knew the facts and*

had repeatedly stated them consistently with plaintiff's claims, would tell the truth; that before using Johnson as a witness, they had no reason to suspect that he would testify falsely, and had no evidence of bribery. It is alleged that since the trial, which resulted in the adverse judgement to Pico, he had discovered the fact of Johnson's bribery and the reasons for his perjury, and it was admitted that Pico had been duly diligent in the premises, and that there was a reasonable certainty that upon another trial, if granted, Pico would gain his cause. Justice Beatty, speaking for the Court, says:

> "Such being the case, is plaintiff entitled to a decree, vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside or annulled for some frauds, there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond controversy that the decree will not be vacated, merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, and when parties have once submitted a matter, or have had the opportunity of submitting it for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed on, or that the prevailing party by some extrinsic or collateral fraud has prevented a fair submission of the controversy. What then is an extrinsic or collateral fraud within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from court by false promise of a compromise, or purposely keeping him in ignorance of the suit, or where an attorney fraudulently pretends to represent a party and connives at his defeat, or being regularly employed to represent him, sells out his

client's interests. In all such instances, the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that the false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or the falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong in such case is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it, if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied.

"But counsel seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. *They say that the fraud committed by Cohn was the bribing of Johnson, that this was collateral and extrinsic; that it was not and would not have been the subject of investigation at the trial of the original action.* We do not think this distinction can be maintained. *The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident.*"

In this case, one of two things has been done, if the complainant is to be believed: Mrs. Smythe, either (1) put in evidence false circumstances; or (2) failed to disclose to her adversary material facts within her knowledge. In either case there is nothing collateral to the issues in the case.

The language in Pepin vs. Lautman (Ind.), 62 N. E. Rep., p. 60, is likewise a good statement of the distinction between intrinsic and extrinsic fraud:

"It is quite true that the ancient maxim, 'Fraud vitiates everything,' applies to a judgment as well as to a contract, but this maxim can apply only in cases where proof of fraud is admissible. It is also true that a false affidavit by a party or a fraudulent instrument might be so used in the pending suit as to amount to fraud, but the distinction must be kept in view between suits, asking to set aside the judgment obtained directly by fraud, and to set aside a judgment founded upon a fraudulent instrument or perjured testimony. In the former the trial court was prevented by some matter outside of the issue actually tried from reaching the merits of the case, while in the latter the court is asked to re-try a matter in issue, and which was, or might have been, actually contested in the former trial. If the unsuccessful party is by any false promise kept away from court or kept in ignorance of the suit, or is represented by an attorney who fraudulently connives at his defeat, or corruptly compromises his interests, he may be relieved from the judgment so obtained, because these are not matters submitted to the court in the actual trial of the case on its merits. The perjured testimony was in a sense a fraud upon the opposite party, but that matter was itself before the Court and was actually involved in the trial which resulted in a judgment, which is itself the highest evidence. It is not the policy of the law to re-try a case betwen the same parties, where in a former suit, they were present in court and subject to its jurisdiction, and the claims of the parties in a matter within the court's jurisdiction were presented to and considered by the court. The party present at the trial must be prepared to meet and expose perjury, because he must know that in no other way can a false claim be supported, and the purpose of the trial is to ascertain the truth, and in doing so the court must determine the truth or falsity of the testimony given."

As illustrating the general principle, and its particular application to cases of perjured testimony, conspiracies to make the facts appear otherwise than they are, the use of forged documents, the creating of a false appearance of cir-

cumstances with intent to deceive, the non-production of evidence that would have been material to the opposite party, the suppression and concealment of facts, and other cases of intrinsic fraud, note also the following:

Homer vs. Fish, 1 Pick, (Mass.), 435;
United States vs. Gleason, 90 Fed. Rep., 778;
Friese vs. Hummel, 26 Ore., 145;
Smith vs. Lowry, 1 Johns Ch., 320;
Green vs. Green, 2 Gray (Mass.), 361;
Cotzhausen vs. Kerting, 29 Fed. Rep., 821;
S. C., 140 U. S., 678;
Hilton vs. Guyot, 159 U. S., 207;
Vance vs. Burbank, 101 U. S., 514;
Steele vs. Refining Co., 106 U. S., 447;
Dixon vs. Graham, 16 Ia., 310;
Haas vs. Billings, 42 Minn., 63;
Loucheine vs. Strauss, 49 Wis., 623;
Moffatt vs. United States, 112 U. S., 24;
United States vs. Minor, 114 U. S., 233;
Gray vs. Barton, 62 Mich., 196;
Amador Company vs. Mitchell, 59 Cal., 179;
United States vs. White, 17 Fed. Rep., 561;
United States vs. Hancock, 30 Fed. Rep., 858;
Maryat vs. Hampton, 7 T. R., 269;
Richards vs. Symes, 2 Atk., 319;
Sewel vs. Freestone, 1 Ch. Cases, 65.

The dictum of Lord Justice James in Flower vs. Lloyd, Vol. 10, L. R., Chancery Div. (A. D. 1878), is pertinent: It appears that the particular fraud there charged was that when controversy had arisen between the parties, an agreement had been reached, that one might employ an inspector to examine the other's printing apparatus: that this examination was made, but that the proprietors had so shifted and juggled the lithographic stones as to deceive the inspector, and that by

reason of this fraud in the physical arrangement of the printing plant, the expert had honestly given false testimony at the hearing to the prejudice of the complaining party.

> "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants, *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or that a misleading production of documents, or of a machine or of a process had been given? There are hundreds of actions tried every year, in which the evidence is irreconcilably conflicting, and must be on one side or the other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witnesses and subordination of perjury, and so the parties might go on alternately, *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the Court ought to pause long before it establishes a precedent, which would or might make in numberless cases, judgments supposed to be final, only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such fraud to himself, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils, not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

There remains in this connection the inquiry whether this suit presents error, intrinsic or extrinsic. In substance, the claim is that Hunter is not dead, and that Mrs. Smythe ob-

tained judgment at law by conspiring with Hunter to cause his disappearance to appear to be a case of drowning, and that she corruptly denied her guilty knowledge of his survival of that experience, and corruptly concealed her fraud from the insurance company, and the Court and jury, trying the law action, with the result, that although the insurance company was convinced the claim was fraudulent, and although it all but moved heaven and earth in its search for Hunter, and although, in its zealous efforts to convict Mrs. Smythe of maintaining a fraudulent suit against it, it subjected her to experiences such as few women, even if innocent, could have endured, and although it had its day in court upon the very issue of fraud tendered by this bill, was represented by able counsel, and supported its case by evidence with which it was satisfied to announce ready for trial, and did announce ready, speculating upon the verdict; and although it presented its motion for new trial, insisting the issue was decided erroneously, and afterwards was allowed a hearing upon the merits in the highest court of the land, and the issue was there re-investigated; yet now, because its general agent, its paid inspector and one or two other witnesses, of whose character we know nothing, say that Hunter is alive, it is to be permitted to re-open the case, and re-try in equity the issue of fact which was decided against it at law. If this is done, then the defendants may in turn inquire whether or no there be a conspiracy between Brown, Milliken, et al., and if so, force another trial of the issue so long as the courts may remain open.

The fraud complained of is, as matter of necessity, intrinsic. The insurance company was not misled nor deceived; it was not kept from Court; its attorneys were incapable of lack of fidelity to its interests, and displayed conspicuous zeal in their defense of the case. It knew that the issue was to be tried before the action was even commenced; it had

its inspector collecting evidence before a claim even was filed with it; it decided in the beginning that its opposition to the case would rest upon claim that Hunter and his sister were conspiring to defraud, and to that end its inspector sought to entrap Mrs. Smythe into a confession of complicity, and to bulldoze her into surrendering the Hunter policies. The pleadings adequately made the issue; the Court permitted all evidence bearing upon it to be adduced, and the charge left the jury free to act upon the evidence of the insurance company, if convinced of its truth.

There is no difference in principle between supporting a case by a forged paper and supporting it by forged circumstances. There is no difference between causing a witness to speak falsely and causing an inanimate object to speak falsely. There is no difference between conspiring to make out one's claim by the combined perjury of several persons, and supporting it by a combination of manufactured physical appearances.

The detailed facts, showing the issues tried at law and the issue here presented are set out under the third section of this brief, and are not therefore reproduced here. The Court's charge, and the special charges, are shown in appendix.

EXTRINSIC FRAUD.

From a careful examination of the authorities relied on by the complainant, the supposed equity of the bill, we have reached the conclusion that they do not support its position.

Marshall vs. Holmes, 141 U. S., 589, in no manner conflicts with the doctrine for which we contend, as this Court by clear implication has held. The point of law involved in the Marshall vs. Holmes case was, whether, after a petition and bond had been filed in a State Court for the removal of the cause to the Circuit Court of the United States, the

State Court, notwithstanding such proceedings, retained authority to consider the equity of the bill. This Court held, in accordance with the all but universal current of judicial opinion, that upon the filing of the petition and bond for the removal, the State Court had no authority to proceed further, but the merits of the case thereupon became cognizable only in the Federal Court. The opinion closes with this language:

> "The suit being in its general nature one of which the Circuit Court of the United States could lawfully take cognizance, it was for that Court, after the cause was docketed there and upon final hearing, to determine whether, under the allegations and proof, a case was made, which according to the established principles of equity entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

The general expressions in that case, even if the jurisdiction of equity had been involved, are not in the slightest degree inconsistent with the statements made in the authorities which we have presented, and that the Court did not intend to limit United States vs. Throckmorton is manifest from the fact that the latter case is cited approvingly. The very point of supposed conflict between these two decisions of this Court has been several times urged upon this Court by disappointed litigants, and this Court has been urged each time to declare the fact of such conflict and depart from the principles announced in the Throckmorton case, and the long line of decisions following it. Thus, in the certificate presented to this Court in Graver vs Faurot, 162 U. S., 435, the United States Circuit Court of Appeals for the Seventh Circuit suggested such conflict and the necessity of having this Court resolve the doubts arising therefrom, and this Court, while refusing to entertain jurisdiction, does not even intimate that there existed any difference in the principles of the cases criticised.

Again, in Bailey vs. Sundberg, 49 Fed. Rep., 583, opinion rendered by the Circuit Court of Appeals for the Second Circuit, Judge Wallace, speaking for the Court, denied relief similar to that sought here, and notwithstanding the libellant twice applied to this Court for certiorari upon briefs urging the apparent conflict between United States vs. Throckmorton and Marshall vs. Holmes, his applications were denied. (145 U. S., 628; 154 U. S., 494.)

Again, as indicating that in the Bailey vs. Dundberg case, the Court of Appeals appreciated and passed upon the very point here at issue, we refer to United States vs. Gleason, 90 Fed. Rep., 778, in which Judge Lacomb, speaking for that Court, after reviewing the decisions supposed to be in conflict, reaches the conclusion that there is no conflict between the decisions referred to, and the Gleason case is disposed of upon the authority of United States vs. Throckmorton.

It is to be remarked, also, in this connection, that when this Court declined to entertain jurisdiction of the case of Graver v. Faurot, upon the certificate presented by the Circuit Court of Appeals for the Seventh Circuit, that Court thereupon disposed of that case upon its merits by distinguishing the facts then before it from both United States vs. Throckmorton and Holmes vs. Marshall, *and planted the disposition of that appeal upon the principle that there had been no trial at equity, because the successful party in the decree there sought to be vacated, had through his fraud prevented the joining of issues, and deceived his adversary into believing that there was no issue open for litigation,* and it further makes distinction between the principles applicable to the ordinary bill in equity seeking to re-open an action at law, upon points that would have been available in the defense at law, and suits in equity, where, under authority of law, the plaintiff calls upon the respondent to make a discovery of

facts within his knowledge pertaining to the rights of complainant. This distinction, whether valid or not, shows that in that case the Court of Appeals was seeking to bring the case then before it within the rule of extrinsic fraud, and to keep it out of the operation of the rules applicable here. No further comment is necessary upon the three references to Graver vs. Faurot than the simple statement outlined above as to the grounds upon which they were disposed of.

Crim vs. Handley, 94 U. S., 652, was decided prior to the Throckmorton case. The bill was dismissed in the Circuit Court for want of equity, and the action of the lower Court was affirmed in this Court. The ground of the Court's action was in substance that the party had had his trial, and was not entitled to a re-examination of same under the facts stated. In the course of the discussion of the points involved, the Court enunciates many well settled equitable principles relating to bills for new trials, and the reasons why, before the present liberality in granting new trials at law obtained, equity formerly exercised a wider jurisdiction than now, in enjoining judgments; but it is said:

> "It may with equal safety, be laid down as a general rule, that a defense cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of the Court, that the defense in the suit at law ought to have been sustained."

The rule deducible from this and the other authorities is that courts of equity may exercise jurisdiction to enjoin a judgment, where the injured party has an equitable defense which could not be asserted at law, or where it appears that this defense could have been made at law, but the injured party was prevented from making it by fraud of his adversary, mistake, or unavoidable accident, unmixed with any fault or negligence on his part. This statement does not undertake to define fraud that is available, where the defense was one

that could have been made at law, but the injured party did not make it. The effect, therefore of this general statement is not to illumine the present discussion, and it remained for the later cases, beginning with the Throckmorton case, to define what fraud was available, and sound principle then required that the distinction which has ever since obtained between extrinsic and intrinsic fraud should be made.

Maddox vs. Apperson, 14, Lec., (Tenn.), 596, *was likewise a case where the bill was held to be without equity, and accordingly dismissed.* There is nothing in that decision supporting the position of the complainant, though it may be remarked in passing, that Judge Freeman, in speaking for the Court in that case, denies the validity of the distinction between extrinsic and intrinsic fraud, in which position he goes counter to the views of this Court, as well as most of the other courts of last resort in the various State jurisdictions.

Marine Insurance Company vs. Hodgson, 7 Cranch, 322, was decided in 1813. Justice Marshall, speaking for this Court, *refused to recognize any equity in a bill for a new trial, asserting a legal defense which was actually made in the trial of the law case.* Manifestly, such a decision is of more weight on the respondent's side of this controversy than on that of the complainant.

Insurance Company v. Bangs, 103 U. S., 780, was a case in which the bill charged fraudulent conspiracy to rob an insurance company by means of causing it to issue policies on the life of an intended suicide, which conspiracy afterwards resulted in the suicide of the insured as contemplated. The company sued to cancel the policies and obtained a decree, which in the action at law to recover on the policies was held to be void, because of being against an infant defendant, over whom the Court had not obtained jurisdiction, and

judgment thereupon went for the plaintiffs seeking to recover on the policies. Afterwards a second suit in equity was brought to enjoin the judgment for plaintiffs in the law action, and this Court denied the relief sought, saying through Justice Field, that the alleged fraud and conspiracy, incident to the issuance of the policies could have been made available as matter of defense in the law action and that not having been so presented, *equity would not re-examine and re-try the case, after the company had had its opportunity at law of making the defense.* It is manifest that decision does not sustain the present bill.

In Wonderly v. Lafayette County, 150 Mo., 635, a judgment at law was assailed in equity on the ground that it had been obtained because of the fraud of the real plaintiff in bringing his suit in the name of a party not really interested in the controversy, whose citizenship was such as to confer jurisdiction on the Federal Court, which strategem, it was averred, was not suspected by the defendant in the law action and was not involved in the controversy, but was in effect a fraud upon the Court, as distinguished from a fraud upon the adverse party. The Court, finding the plaintiff to have committed the fraud upon the jurisdiction of the Court, held, under the circumstances of the case, such fraud to be distinguishable from *fraud intrinsic to the cause of action as such, its merits, enforceability, etc., and sustained the bill, being careful, however, to point out that the Supreme Court of Missouri was definitely committed to the principles of the Throckmorton case, and that the bill was sustained solely, because the Court construed it to charge a fraud in the procurement of the judgment, as distinguished from fraud in the case of action* (citing Hamilton v. McLain, 139 Mo., 638, which is one of the most luminous discusisons of the subject, and Bates v. Hamilton, 144 Mo., 14).

Fraud in the procurement of a judgment means fraud

operating upon the machinery of the court as such, or fraud operating directly upon the energies, activities and defenses of the adverse party to the suit, and does not mean fraud in the production of perjured testimony, forged documents, simulated appearances, to sustain the cause of action, or the like, as is made manifest by that decision and the authorities which are cited and stated to be not in conflict with it.

This statement of the true rule of equity jurisdiction shows, that the present application seeks to move this Court to go to much greater lengths even than has ever been allowed.

Guild v. Phillips, 44 Fed. Rep., 462, was a case in which the complaining party sought to re-open a compromise decree, which he had been led to make by reason of fraudulent representations made to him by the other party to the decree, and it involved simply the general principle, that a contract, whether of record or otherwise, to which a party has been induced to consent by fraud, may be set aside. The real legal question involved in the present record is in no manner involved there.

Ocean Insurance Company v. Fields, 2 Storey, 59, was decided at circuit by Mr. Justice Storey some thirty-seven years before the decision of the Throckmorton case. There had been a trial at law to recover the insurance upon a schooner called the Francis, which it was alleged had been lost at sea, and the defense urged was that the plaintiff has fraudulently cast her away and destroyed her. The plaintiff prevailed. Afterwards and before the judgment was paid, the insurance company discovered that the vessel had not been cast away, as was made an issue in the law trial, but that the complainant had secured augers and bored holes in the bottom of the schooner, causing her to sink. The bill for new trial was exhibited on the theory, among others, that the insurance company had not litigated *the fact of boring the*

holes in the vessel, and that it had no reason to suspect such conduct on the part of the plaintiff, and did not suspect it, and that this knowledge had been acquired after the rendition of the judgment at law. Justice Storey seems, from a careful reading of the opinion, to have been greatly in doubt, as to whether the bill could be maintained at all, but finally reaches the conclusion that it might possibly be sustained on the theory that the matter of boring the holes in the vessel had not been litigated at law, and could not have been suspected by the insurance company, and in order that the case might be developed upon the proofs, he overruled the demurrer to the bill, and reserved the cause until testimony could be taken. Among other things, he says:

> "In the present case, I am not prepared to say that the very fraud now preferred in the bill was identical with that propounded at the trial. Fraud in casting away a ship may be very distinguishable from fraud in destroying her by boring holes in her bottom. * * * * * I should say that it was not the casting away of the vessel, but the boring of holes in her bottom that was the real proximate cause of the loss and destruction of the vessel. But it is unnecessary to decide that, because upon a demurrer *in odium spoliatoris*, the Court will not decide a matter of such importance in his (the spoiler's) favor, but will reserve it for a final hearing on the merits."

It may be suggested, with reference to this decision: First, the opinion indicated grave doubts on the part of the great judge who decided it; second, these doubts were not finally disposed of by him, but the case was reserved for development, and we are not advised what final disposition was made of the case at circuit or on appeal; third, the defense was one not available to the insurance company at law, because the vessel, which was the only available evidence of the manner in which it had been destroyed, was sunk; and, fourth, the issue had never been litigated at law, and therefore, there was no re-examination of an issue previously litigated presented to the Court for examination.

Stowell v. Ellred, 26 Wis., 505, holds that *the perjury of a plaintiff*, who is called to testify as a witness for the defendant, amounts to *such fraud upon the defendant* as to justify setting aside the judgment at law. The case is not fully reported, but seems to rest wholly upon the proposition, that if the plaintiff perjures himself in the trial of a law action, that in itself affords grounds for the interposition of equity. We need make no reply to such a proposition at this stage in the history of our jurisprudence.

Trefz v. Insurance Company, 8 Fed. Rep., 177, opinion by Nixon, district judge, holds in effect, that an insurance company, which had made a defense at law to an action brought to recover upon policies of insurance, that the insured was an habitual drunkard, in violation of the terms of the policy, and which had gone to trial on that issue, without having adequate proof to sustain its plea, might afterwards, on securing this proof, enjoin the enforcement of the judgment at law. This, if true, would render unnecessary any real preparation for the trial of actions. A defendant who really prefers to litigate the issue at equity, may go to trial at law upon insufficient testimony, take its chances speculating on getting a verdict, and, if unsuccessful, then renew the controversy on the equity side of the docket. Such a rule cannot be correct, and that it is not, is established from the fact, that it has, so far as we have been able to discover, never found expression in any other authority than the case cited.

The Fraker cases referred to at p. 88 of the complainant's brief, appear never to have passed the trial court, and, moreover, present the same question as is involved in the Guild v. Phillips case above, to-wit: A compromise judgment obtained through the fraud of the beneficiary thereunder. This is the construction put upon the judgment mentioned when the Fraker case is under review in Hunter v. State, Tex. Crim. App., p. 98.

Where fraud has been shown, the immediate inclination of the Court is to right the wrong, if possible, but such a desire may make exceeding bad law. This reflection is especially important where the complaining party, in his headlong pursuit, seeks to visit the consequences of a wrong done him upon the innocent as well as the guilty.

FOUR.

The Equities of the Appellees.

I.

Mrs. Smythe and her brother, W. A. Hunter, in 1896 were respectable and reputable residents of Pecos, Texas, a little county seat in the Western and arid portion of the State. They were members of a family of Hunters living in Licking County, Ohio. The family had extensive connections and numerous constituents, and its standing in Ohio was substantial. So far as known, no suggestion had ever been made against any member of the connection imputing any want of integrity. Mrs. Smythe had originally removed to Western Texas with her husband, who was an attorney, and her brother, W. A. Hunter. Hunter and Mettler purchased from the State certain sections of school land in Loving County, adjacent to the county of which Pecos was the principal town, and had engaged in an attempt by means of irrigation, to develop the lands. The enterprise proved to be a disastrous one, and after losing some money in it, Mettler died, leaving his widow surviving. In order to sustain herself, she became a seamstress, but continued to enjoy and apparently to merit the confidence and respect of her friends and acquaintances in Pecos.

When W. A. Hunter disappeared on the occasion of his trip from Pecos in December, 1896, the circumstances strongly tended to show that he had been drowned. Pecos being

a small town, and the disappearance presenting rather unusual circumstances, interest was aroused and a great many of the citizens took occasion to visit the scene of the supposed drowning, and to remark upon the probabilities of that theory. The result of this interest found expression in the general belief of the community that Hunter had in fact lost his life, as indicated. It appears that only one man in the community entertained a different opinion. He was a saloon man named Johnson, and his candor was suspected, because of his having been brought under the influence of a somewhat unprincipled inspector in the employ of the insurance company shortly after Hunter's disappearance.

When Mrs. Smythe began to take steps towards winding up her brother's affairs, she learned through one of the bankers of Pecos, that some of her brother's papers were lodged with the bank for safe-keeping, and upon examination, the insurance policies in the complainant company on Hunter's life, in her favor, were found. The finding was to all appearances a surprise to Mrs. Smythe, but being of course gratified at this evidence of her brother's foresight in her behalf, she took the advice of her banker friend, Mr. R. D. Gage, a citizen of excellent standing, formerly a member of the State Senate, a retired attorney, and a man of means, and under his suggestions, prepared, with the assistance of the inspector of the Insurance Company, proofs of death under the policies. The inspector, in rendering such assistance, at first suggested no lack of confidence in the claim, but after securing from her and witnesses all of the affidavits practicable, notified her that the company regarded the claim as fraudulent, sought to entrap her into a confession of complicity in the fraud, and declined payment.

Mrs. Smythe thereupon again consulted with Senator Gage, and being advised by him to commence suit at some point where trial would be convenient, when the Insurance

Company removed the cause into the Federal Court, as it was expected to do, finally Dallas was agreed on, and Senator Gage advised Mrs. Smythe to go to Dallas, and there employ competent counsel, recommending to her the law firm of Alexander, Clark & Hall, having confidence, not only in the ability of that firm, but having been the personal friend for years of William H. Clark, a member of said firm, and some time President of the Texas State Bar Association.

Mrs. Smythe, taking this advice, went to Dallas, and employed said firm, and at or about the time of said employment, Mr. Clark of said firm made a personal visit to Pecos, and there investigated at first hand the local evidences of Hunter's disappearance, conferred with a representative number of the leading citizens and with Senator Gage, learned of the unusual, not to say unprincipled, conduct of the inspector who went to Pecos on behalf of the Insurance Company, when it had notice of Hunter's death, and reached the conclusion that Hunter had undoubtedly been drowned.

At the time of the employment of this law firm, Mrs. Smythe under date of October 27, 1897, evidenced in writing the said contract of employment in the following language, (omitting recitals):

> "The premises considered, I, Mrs. Jennie M. Mettler, a *feme sole,* of Pecos, Reeves County, Texas, hereby employ Alexander, Clark & Hall, of Dallas, Texas, to institute and prosecute suit against said Insurance Company upon said policies, I being the owner and holder thereof, in such court as they may deem advisable. It is understood, that said Alexander, Clark & Hall will institute and prosecute said suit for a contingent fee of one-third of the amount recovered upon said policies.
>
> "It is further understood and agreed that should any proposition of compromise be made in the premises, that the same is to be submitted by said Alexander, Clark & Hall to said Mrs. Jennie M. Mettler before the same is

accepted; that is, the said Mrs. Mettler is to sanction and authorize any compromise made.

"It is understood and agreed that for and in consideration of the legal services rendered, and to be rendered, by the said Alexander, Clark & Hall, this instrument conveys to the said Alexander, Clark & Hall an undivided one-third interest in said policies" (Rec. p. 202).

Under their employment, Alexander, Clark & Hall made numerous fruitless attempts to compromise the claim, making various offers; among others, to take one-half on condition of prompt settlement. Being unable to secure any settlement, they filed suit upon the policies on behalf of their client in December 2, 1897, in the District Court of Dallas County, Texas. In due course, the defendant removed the proceedings to the Circuit Court of the United States in and for the Northern District of Texas, at Dallas, and the cause remained there until it was finally disposed of by trial and writ of error to this Court.

The preparation of this cause for trial proceeded and a great amount of testimony was taken. The defendant persisted in its contention that Hunter was not dead, and besides, evidently depended in the preparation of the case for trial upon some technical defenses, in addition to the contention that Hunter was not dead.

In the meantime, the law firm of Alexander, Clark & Hall was dissolved, W. L. Hall retiring, but retaining his professional relation to and interest in Mrs. Smythe's action, and a new firm was constituted, to-wit: Alexander, Clark & Thompson; and on June 10, 1899, Mrs. Smythe executed a new contract with the new firm of Alexander, Clark & Thompson and W. L. Hall, reciting that the prosecution of the action upon the insurance policies involved more onerous services than originaly contemplated, and that the new contract of employment was to be considered as in lieu of

and in substitution for the original contract or "power of attorney."

The new contract (omitting recitals), stipulated:

"That I. Jennie M. Mettler, the present owner of said policies, hereby ratify my said employment of said attorneys, and do now employ them, the said Alexander, Clark & Thompson, and W. L. Hall; and it is understood and agreed that said Alexander, Clark & Thompson and W. L. Hall will continue to prosecute said suit as in their judgment they may deem proper, and in consideration of the legal services rendered and to be rendered in the collection of said policies, by suit or otherwise, they are to receive and are hereby given, transferred, assigned, and delivered one-third interest of, in and to said policies and claim against said Life Insurance Association, and the further sum of $2,500.00 thereof, that is, should the principal, accrued interest and 12 per cent. statutory damages, if allowed, amount to $18,000.00 and be collected, they would own and receive $8,500.00 thereof; as well as the attorneys' fees provided for by the statutes of Texas in such cases; and should a less amount on account of principal, interest and said 12 per cent. damages be collected by suit or compromise, they would own and should receive their pro rata part thereof, according to their interest aforesaid, as well as said attorneys' fees, if any, collected; it being understood that on account of the decision in G., C. & S. F. Railway Company v. Ellis, 165 U. S., 150, it is very probable that a recovery of 10 per cent. attorneys' fees, as well as of the 12 per cent. damages cannot be enforced.

"It is further understood that said Alexander, Clark & Thompson, and W. L. Hall, may employ such associate attorneys to aid them in the prosecution of said suit as they may deem necessary, it being agreed that they are to pay such attorneys themselves, and the said Mrs. Mettler is not to be held liable for attorneys' fees other than provided above" (Rec. p. 200).

In contemplation of securing the authority indicated in the contract just quoted, to employ associate attorneys, or in

pursuance of that contract, Alexander, Clark & Thompson and W. L. Hall, in the spring or summer of 1899, employed Mr. M. A. Spoonts, an attorney of the Fort Worth, Texas, bar, general and local attorney for several railway interests and also an ex-President of the Texas State Bar Association. This arrangement was made through Mr. Clark, and at the time of the employment of Mr. Spoonts, no stipulation as to the fee which Mr. Spoonts was to receive was made; that is, the amount of his fee was left open. Mr. Spoonts, after his employment, actively assisted in the further preparation of the case for trial, and rendered the services covered by his employment. It may be proper to remark here, that the employment of Mr. Spoonts was never evidenced in writing.

On May 28, 1900, the trial of the law action was begun in the Circuit Court at Dallas. After contest, covering several days, indicating that both plaintiff and defendant had developed all the strength of which they were, respectively, capable, a verdict was had on June 2, 1900, in favor of plaintiff, for principal, interest, damages and attorney's fees. The issue of Hunter's death, *vel non*, was the one about which the case turned. The sharp cross-examination of Mrs. Smythe, the insistance by the insurance company upon circumstances indicating that the disappearance was a fraud, and that Mrs. Smythe was in the conspiracy, coupled with the testimony of several witnesses, who claimed to have seen Hunter in the flesh after his alleged drowning, indicate in gross the theory of the insurance company, plaintiff contenting herself with putting in proof all of the circumstances surrounding his disappearance, and contending that the effect of these combined circumstances was to force the conclusion that Hunter was drowned, as claimed.

The conflicting theories of the case were fully presented by the Court in its charge to the jury. In due course, a motion for a new trial was presented and overruled, several

of the specifications of error relating to the issue of Hunter's death, and raising questions of law as to the sufficiency of the evidence to support the verdict. The motion was overruled, and writ of error taken to this Court, the Tenth Assignment of Error urged by the present complainant, as plaintiff in error in that proceeding, being to the effect that the verdict upon the critical point of Hunter's death, was without support in the evidence.

After Mrs. Smythe obtained the judgment against the insurance company, which has been described, William H. Clark having in the meantime acquired the interests of W. M. Alexander, Wm. Thompson and W. L. Hall, his former associates in the case, and being indebted to the Phillips Investment Company of Kansas City, Missouri, in the sum of $1,471.57, balance due it upon monies borrowed upon certain real estate, a transaction wholly independent of this controversy, and desiring to secure that company in the payment of its indebtedness to it, sold and assigned to said company as collateral, his interest in the judgment mentioned, providing, however, that upon collection by the investment company of his note, the hypothecation contract should terminate, and his interest revert. It was further stipulated in said contract, that same should not, in any way, interfere with W. H. Clark in his conduct of the litigation as leading counsel in Mrs. Smythe's behalf. (Rec., 197.)

Mr. Clark acquired said interests of his said former partners in the division of their law business when the partners dissolved, and yet appellant would leave him without restitution.

William H. Clark employed Senator Culberson, an attorney, duly enrolled in this Court, to assist in the presentation of the cause here, agreeing to pay him as fee for his services, contingent, however, upon ultimate success of the suit, the sum of $1,000.00, $500.00 of which was to be paid

by the client, Mrs. Smythe, and $500.00 by Mr. Clark. To evidence this contract of employment, on December 30, 1901, Mrs. Smythe and Mr. Clark agreed in writing with Senator Culberson, as follows: (Omitting recitals.)

> "Premises considered, we the said Mrs. Jennie M. Mettler, a *fem sole*, and W. H. Clark, her attorney, the owners of said judgment, hereby employ Charles A. Culberson of Dallas, Texas, now temporarily residing in Washington, D. C., to brief said case for and in behalf of the said Mrs. Jennie M. Mettler, defendant in error, and to orally argue said case for her on the submission thereof in the Supreme Court; and for and in consideration of such services rendered and to be rendered by him, we hereby give, transfer and assign to him, said Charles A. Culberson, an interest of one thousand ($1,000.00) dollars in and to said judgment, and also the cause of action, that is, policies of life insurance sued upon. It is understood that the payment of said fee is contingent upon recovery upon said policies. It is further understood that five hundred dollars of said one thousand dollars is to be paid out of the interest of the said Mrs. Jennie M. Metzler in said suit, and that the remaining five hundred dollars is to be paid out of the interest of said William H. Clarke therein, and that the one is not to be responsible for the portion to be paid by the other; that is, each one undertakes to pay said Charles A. Culberson five hundred dollars, as aforesaid." (Rec., 70, 71.)

When this contract was made the case was pending, as has been stated, in this Court, the questions involved being purely whether prejudicial error had been committed in the trial court that could be availed of by the plaintiff in error. Briefly stated, the questions presented were four in number, as is manifest from an inspection of the Record in this Court of the disposition of that writ of error. Among the questions involved was one relating to the constitutionality of the Texas statute, providing for penalties and at-

torney's fees in certain causes in suits upon life insurance policies, and one to the effect that the verdict finding Hunter dead was without support in the evidence.

No reversible error was found in the judgment, and it was accordingly affirmed on May 5, 1902, and the claims of the plaintiff in error, so persistently made and bitterly supported, to the effect that Hunter was alive, settled adversely to it in the most conclusive possible way.

On May 29, 1902, the plaintif in error drew its draft in favor of J. H. Finks, clerk of the United States Circuit Court, in the sum of $24.028.25, reciting upon the face of the voucher: "In full judgment in the case of Mettler vs. Fidelity Mutual Life Association, with interest thereon to June 4, 1902," and forwarded the same to its Dallas representatives. This voucher was placed in the registry of the Circuit Court on June 2, 1902. J. H. Finks, the clerk, and official in charge of such registry, endorsed this check to the order of E. J. Gannon, cashier of the American National Bank of Dallas, and deposited same in that bank to the general credit of the account with that bank of the United States Circuit Court at Dallas. The check was treated as cash, in so far as to credit being given by the bank to the Circuit Court account; and after such credit, it was forwarded by the American National Bank for collection, and paid through the Farmers & Mechanics' National Bank of Philadelphia on June 6, 1902.

On June 3, 1902, the fund in the registry of the court was, under order of the Court, paid out to the order of Mrs. Smythe, as will be presently explained, receipts were taken and the proceedings terminated.

Up to this time mandate from this Court had not issued, nor been filed in the Circuit Court at Dallas, nor had any process to enforce the judgment been applied for on behalf of any party at interest. On June 6, 1902, mandate

did issue from this Court. At that time the judgment was *functus officio,* having been fully discharged. The mandate was filed in the Circuit Court on June 17, 1902. We may assume that inasmuch as no one was then interested in the mandate, it must have been issued by the clerk of this Court without particular application having been made therefor.

The clerk of the Circuit Court testified that the judgment mentioned was paid through his office June 2, 1902, by means of the draft of the insurance company above described and his banking the same and disposing of the proceeds. No actual cash was handled. The Circuit Court had its general account at the bank, and through this general account made all disbursements attaching to the Circuit Court, and no special account at the bank was opened for Mrs. Smythe's case, nor were the proceeds of the voucher of the insurance company kept separate from any other funds to the credit of the Circuit Court account in said bank.

The contracts of employment of Alexander, Clark & Hall, and Alexander, Clark & Thompson and W. L. Hall, were in the form commonly used under the statutes of the State of Texas, providing for the regulation of contracts for contingent fees. They were treated, however, as matters of confidential arrangement between Mrs. Smythe and her attorneys, and notwithstanding the statutes and decisions of Texas provide for notice of such interest being given to the adverse party by filing a contract duly attested among the papers of the cause, or by giving actual notice to the adverse party of such interest, these contracts were never so filed among the papers in the cause, nor was any notice of same given to the insurance company; and at the time it discharged the judgment it was dealing solely with Mrs. Smythe, the legal and equitable owner of the judgment, and was under no obligation to take notice of, and it did not

take notice of the attorneys' said contracts. The Phillips Investment Company, it is true, had filed with the papers in the cause the hypothecation contract between it and W. H. Clark; but it is probably true that such filing was of no consequence, as it was not connected of record with the plaintiff or any other party having any record evidence of claim. The arrangement between Mr. Clark and Mr. Spoonts was entirely a verbal one, and rested in the same condition as has been heretofore described, except that after this Court affirmed the judgment in the law action, Spoonts and Clark had agreed that the former's fees should be $1,500.00. The contract under which Senator Culberson was employed was never filed in the Circuit Court, nor brought in any manner to the attention of the insurance company or the clerk of the Court in his disbursement of the monies held by him for Mrs. Smythe.

The attorney's contracts were given to and filed by the clerk after the judgment had been satisfied, to evidence Mr. Clark's authority to collect the proceeds of the judgment as Mrs. Mettler's attorney.

After the insurance company had paid Mrs. Smythe, through its deposit of funds in the registry of the Court, as aforesaid, the amount of the entire judgment against it, Mr. Clark, as her authorized counsel, came to the office of said clerk of said Court, and exhibiting his employment contracts, gave directions as to certain payments to be made out of the proceeds of the judgment before withdrawing from the registry the balance accruing to Mrs. Smythe. As showing further authority to act for Mrs. Smythe in disbursing her monies in the registry of the Court, he exhibited to and filed with the clerk a letter to him from Mrs. Smythe of date May 12, 1902. (Rec., 199.)

Acting under the authority of the powers of attorney so exhibited, and upon the authority of the letter mentioned,

the clerk disbursed the funds paid to him on account of Mrs. Smythe by drawing his checks as clerk of said Circuit Court in favor of the parties hereinafter mentioned, and delivering same to the respondents, under the following circumstances:

Senator Culberson received his fee and $26.00 expenses, through the friendly offices of Mr. C. A. Rasbury of Dallas, who acted for him under authority of a letter written him by Senator Culberson of date May 8, 1902, reading as follows:

Dear Rasbury:

"The insurance case against the Fidelity Mutual Life Association about which I wrote you some time ago, was affirmed on Monday, and in accordance with my agreement with Mr. Clark, my fee is $1,000, and is due when the judgment is paid. As I have heretofore written you, I will be glad if you will do me the kindness to collect this $1,000.00 for me, as Clark wires me to-day that the judgment will be paid in Dallas. He also owes me $26.00 for printing briefs, which please collect also, and deposit the whole sum in the National Exchange Bank of Dallas to my credit, and notify me when it is done." (Rec., 203.)

Mr. Rasbury collected Senator Culberson's fee, deposited, as he was requested to do, and as is alleged in the answer of Senator Culberson and not put in issue, same was disbursed long prior to the alleged discovery of Hunter. The fee paid Senator Culberson, as well as the $26.00 expenses, was by direction of Mr. Clark paid wholly out of the fee due him (Mr. Clark). That is to say, no part of it was charged against the balance accruing to Mrs. Smythe after Mr. Clark's fee was paid. Subsequently, however, in an adjustment between Mr. Clark and Mrs. Smythe, he charged her with his advancement of $500.00 on her account to Senator Culberson. She being liable therefor, as agreed upon. It will

be seen from the foregoing that the written evidence of Senator Culberson's employment did not at all figure in the disbursement of the fee going to him in the transaction.

M. A. Spoonts, being advised by Mr. Clark in May, 1902, that the judgment was to be paid, wrote the clerk of the Court that his interest was $1,500.00, and requested him to remit such amount to Fort Worth, when collected. He attached to his said letter of request to the clerk the letter of advice he had received under date of May 26 from Mr. Clark. The clerk testified that this payment was made to Mr. Spoonts by direction of Mr. Clark, and that it was charged against Mr. Clark's fee in the transaction.

Under instructions from Mr. Clark, the clerk paid the Phillips Investment Company $1,540.24, its hypothecation contract being already on file, no further notice was taken of same. The clerk, however, required the Phillips Investment Company to surrender the note it held against W. H. Clark for $1,471.57, and caused same to be marked cancelled, and same was filed with the other vouchers in the case. The effect of this transaction was the surrender by the Phillips Investment Company of its valid demand against Mr. Clark in the amount indicated.

The clerk further required receipts from each of the three parties above named.

After discharging the aforesaid obligations to Senator Culberson, Mr. Spoonts and the Phillips Investment Company, Mr. Clark directed the clerk to pay him the balance due on his fee, $8,346.00, and the remainder belonging to Mrs. Smythe, $11,616.00, and gave the clerk receipts similar in form to those given by the other parties at interest.

Besides the affirmative showing in the record as to the disbursement by Clark, Culberson and Spoonts of the several sums obtained by them for their services in the law action, there was neither allegation nor proof to the effect that any of

the present respondents had on hand any of the sums severally received at the time of the alleged discovery of Hunter, or of the filing of the original bill in this cause. In the absence of any such charge or proof in the present character of case, it may be assumed, the liability is predicated upon some theory other than having possession of funds which the pleader was desiring to trace, locate and recover. The facts detailed show in substance the payment to Mrs. Smythe of the full amount of her judgment against the insurance company, her payment to Mr. Clark of his fee, and his payments to Mr. Spoonts, Senator Culberson and the investment company of his several obligations to them. They are in consequence three steps removed from the insurance company. Mr. Clark occupied as favorable a position as any other creditor of Mrs. Mettler would have occupied, had she in paying their debts told them that she was paying them with the proceeds of the law judgment, and that she had finally prevailed against the insurance company, in the face of its denial of Hunter's death. As to the other appellees, the complainant might as well sue Mr. Clark's tailor, his groceryman or any other person with whom he may have conceivably had such dealings.

The settled policy of the Texas courts is favorable to contradicts for contingent fees, and it is shown in this case by the testimony of Mr. Spoonts, who, for years, has been, and is still, general attorney, as well as local attorney, for several of the most important railway systems in Texas, that the contracts with the several attorneys above mentioned are in the customary form obtaining in Texas.

James vs. Turner, 78 Texas, 243;

Hill vs. Cunningham, 25 Texas, 31;

G., C. & S. F. Ry. Co. vs. Scott, 28 S W. R., (Tex.), 457.

In 1889, by legislative act, the validity of such contracts

was expressly recognized, and provision made for giving the adverse party notice of the existence of same. In the case last cited, upon the authority of Winston vs. Masterson, 87 Texas, 200 (202), an attorney having such a contract was held to be in no sense a party to the suit, not bound even to execute any security for costs under statutory regulations imposing such obligations upon parties. It was even held in Winston vs. Masterson that a judge was not disqualified to sit in the trial of a cause in which his brother, who had a contingent interest in the cause of action, appeared as of counsel for one of the parties. We are not advised to what extent such contracts have come within the observation of the members of this Court, but an examination of the numerous Texas authorities shows that not only is the practice permitted, but it is recognized as affording to impecunious parties in many cases the only means of securing competent representation.

In the present case the complainant disclaims any liability of these respondents on the theory of wrongful conversion. It seems instead, to be seeking to rest its case upon some theory of trusteeship on the part of these respondents. Confused with this idea is that of following its funds, and should it fail in these remedies, it seems to gather comfort from the assumption that possibly respondents are liable as for money had and received. Should all these fail, then the long array of decisions about the vulnerability of judgments in the hands of assignees to equities existing between the original parties is relied on. We believe the fair and succinct statement of the facts detailed above explodes all these conflicting, vaguely defined and unsupported theories.

The Bank of the U. S. vs. The Bank of Washington, 6 Peters, 8;

Holly vs. Missionary Society, etc., 180 U. S., 284;

Merchants Ins Co. vs. Abbott, 131 Mass., 397;

Walker vs. Conant, 69 Mich., 321;
Langley vs .Warner, 3 N. Y., 327;
Stephens vs. Board of Education, 79 N. Y., 183;
Justh vs. National Bank, 56 N. Y., 483;
Webb vs. Burney, 70 Texas, 322;
Rector vs. Fitzgerald, 59 Fed. Rep., 808;
Eylar vs. Eylar, 60 Texas, 315;
McCausland vs. Pundt, 1 Neb., 211;
Steele vs. Renn, 50 Texas, 467;
Wadhams vs Gay, 73 Ill., 415;
Glover vs. Coit, 36 Tex., Civ. Apps., 104;
Gould vs. McFall, 118 Pa. St., 455;
Macklin vs. Allenberg, 100 Mo., 337.

Brief comment upon some of the cases just cited appears desirable.

In the Holley case, (180 U. S., 284), an executor, (Henry C. Thompson), holding trust funds, made payment in apparent discharge of his duty to the Foreign Missionary Society of the Episcopal Church, as directed in the will, payment being made in the form of a check drawn by said executor upon the Union Trust Company. This check was deposited by the Missionary Society in its local bank, and was in due course collected from the bank upon which it was drawn, and thereafter the Missionary Society applied the same, with other monies, to the cause of missions, before having notice of the claim asserted in the bill of complaint..

A material part of the amount so checked out by the executor to the Missionary Society, as aforesaid, was $12,000.00 in funds, which the executor, as an attorney, had received from a client, James Holley, for the purchase of real estate, which trust he had violated in paying over such sum to the Missionary Society. Holley, discovering that Thompson had misapplied said funds, gave notice to the Misisonary Society of his ownership of such funds and filed this bill. It was

admiited that the Missionary Society received the funds innocently, but as payment upon antecedent indebtedness of the executor to it. This Court, speaking through Mr. Justice Shiras, dismisses the bill of complaint upon principles pertinent to the present case, and stated as follows:

"There was nothing, either in the previous transaction or in the fact of the payment by Thompson's check to put the (missionary) society upon notice, or to have justified the treasurer in refusing to accept the payment. When Thompson's check was paid the following day, and the proceeds had gone into the bank account of the Missionary Society, the matter was fully closed between the executors of Saul's estate and the society."

"Beyond this, we think the evidence fairly shows that the Missionary Society had appropriated and expended the money so received to the purposes appointed by the testator before any notice was given of the complainant's claim. While such use and application of the money might not exonerate the society from liability, if they had received the money under circumstances that visited them with notice of Thompson's dishonest conduct towards Holley, yet if the money received in good faith by the legatee had actually and bona fide been applied and expended for the use of the beneficial purposes appointed in the will, without knowledge of Holley's claim, or indeed, that such a man existed, we think a court of equity would refuse to hold the society as a trustee *ex maleficio.*"

"This is a case in which a Court of equity is called upon to decided upon which of two innocent parties is to fall a loss caused by the dishonesty of a third person. The relation that existed between Thompson and the Missionary Society was that of executor and legatee, between Thompson and Holley, that of attorney and client. As between themselves, Holley and the Misisonary Society were absolute strangers." * * * "As against the Missionary Society, Holley, in the circumstances disclosed, had no equities, and even if it could be said that the equities were equal, a Court of equity will not transfer a loss that has already fallen upon one innocent party to another party

equally innocent."

In the present case, the relation between Mrs. Mettler and these appellees was either directly or derivatively that of client and attorneys, and the present appellees were strangers to the insurance company. They received monies voluntarily paid by the insurance company, in satisfaction of their demands against Mrs. Mettler. The claim of the insurance company that Hunter was alive had been finally settled against it, and it had evidently abandoned that position. The funds were received in due course and disbursed in due course before any of them had notice of any adverse claim of the insurance company, and in reliance upon the finality of the judgment. It is admitted they were all innocent of legal or moral blame. No facts justifying them in refusing to accept the funds coming to them from the law judgment are even suggested. These admitted circumstances show the applicability of the decision of this Court in the Holley case.

In Merchants' Insurance Company vs. Abbott, 131 Mass., 397, the endeavor of the complainant was to require the assured and innocent assignees of portions of certain fire policies to refund the payment by the insurance company of the amount claimed on the policies, on the ground that the insured had induced it to pay off the policies by fraud and mistake. At the trial it was proved that the insured had instigated the burning of his property, in order that he might collect the insurance thereon, and that his proofs of loss were false and fraudulent. *It was admitted, however, that the assignees, who had received a portion of the funds apparently due on the policies, were ignorant of the fraud, and innocent of all participation therein, though it was shown that the transfer of the policies to them was made upon account of antecedent indebtedness due them by insured.* Mr Justice Gray, after stating that the insurance company had all necessary recourse against the insured for his fraud, denies its recourse against the inno-

cent assignees, who participated in the settlement, announcing the following principles, pertinent to this suit:

"There can be no doubt of the liability of Abbott in this action. If the money had been paid by the plaintiffs to him, it could be recovered back as money paid under the influence of a mistake betwen them, and him as to the existence of a state of facts that would entitle him to the money. Although Abbott had not, in fact, received the money, the payment of the money by the plaintiffs at his request, in discharge of his debt to the other defendants, is equivalent to the receipt by Abbott of so much money, and is sufficient to enable the plaintiffs to maintain the action against him upon the special count, if not upon the general count, for money had and received."

"As to the other defendants (the assignees), a different question is presented. If before receiving the money from the plaintiffs, they had known the true state of facts, and had participated in Abbott's fraud, they would have been liable to refund the money; but the report states that there was no evidence of fraud, nor was it contended at the trial that they had any knowledge of the fraudulent conduct of Abbott, but it was conceded that they were wholly innocent parties.

"As to them, therefore, the case stands thus: They held a valid debt against Abbott, the assignment by Abbott to them was made in consideration of that debt and to secure the payment thereof, the previous existence of the debt does not make the assignment the less a conveyance for value. There is no question of the validity or the genuineness of the assignment. Having been made after the fire and after the amount of the loss had been adjusted between the plaintiffs and Abbott, it was in legal effect an assignment of the claim of Abbott upon the plaintiffs for a certain sum of money. That claim not being negotiable in form, could not have been sued by these defendants, except in Abbott's name, and subject to any defenses which these plaintiffs had against him, but the plaintiffs, at Abbott's request and without any suit, paid the amount of the loss, as adjusted between themselves and Abbott, di-

rectly to these defendants, who were wholly ignorant and innocent of the fraud of Abbott.

"As between the plaintiffs and these defendants, there was no fraud, concealment or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold money honestly, for value, with the right to retain it as their own under the title derived from Abbott, independent of the fraud practiced by him upon the plaintiffs.

"The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that while plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants."

In the case at bar, Mr. Clark is the assignee for value before suit filed and without notice, of an interest in Mrs. Mettler's demand against the insurance company, based on the Hunter policies. After failing to prove that Hunter was not dead, the insurance company voluntarily paid Mrs. Smythe the amount of the demand. Mrs. Smythe, through Mr. Finks, paid Mr. Clark his portion thereof, after first, by direction of Clark, paying out of his interest the demands of the other appellees herein; and it is admitted that they were at all times innocent. The parallel with the Abbott case is perfect. If the trial Court was correct in annulling the law judgment, the case then stood unembarrassed by the judgment, and the present appellees stood in an attitude at least as favorable as that of the assignees in the Abbott case.

Glover vs. Coit, 36 Texas Civil Appeals, 104: In a proceeding to probate a will, opposition was lodged on the ground that its execution had been obtained by fraud and artifice, and that the testator was insane. After a contest the probate was allowed. Thereafter, the legatee under the will, in con-

sideration of services rendered to her by her attorneys in the probate matter, conveyed to them an interest in the property affected by the probate of the will. Afterwards, fuller proof was obtained as to the fraud inducing the execution of the will, and the original contestants in the probate proceedings applied to the Appellate Court for *certiorari*, and also brought suit to remove as cloud upon the title which contestants would have to the property, upon vacating the will, the alleged title of the attorneys, the claim being made that they took with notice, because: (1) They were attorneys for the proponent of the will; and (2) The contestants had by their pleadings alleged the fraudulent execution of the will. The Court say, in upholding the *bona fides* of the purchase by the attorneys of an interest in the estate:

> "The will of James T. Coit had been probated and judgment entered in the County Court establishing the same as his last will and testament, and such judgment was in full force at the time, appellees purchased the property. This judgment was rendered in a Court of competent jurisdiction, as a judgment in *rem* and binding upon the heirs of James T. Coit, deceased, and all other persons, until revoked or set aside. * * * Having bought the land sued for while the judgment admitting Coit's will to probate was in force, their (the attorney's) title could not be affected by proceedings subsequently instituted, and resulting in the reversal of said judgment, and annulling said will, if they were purchasers in good faith for value. That they were such purchasers is well established. The judgment of the County Court, admitting the will be probate, as long as it remained in force, was conclusive of its correctness and the validity of the will. * * *
>
> "At the time they (the attorneys) purchased, the will had been admitted to probate, and its validity established by the judgment of the County Court. This judgment embraced the finding, that the charges of fraud and deceit on the part of the devisee to procure the execution of the

will, urged by the contestants in the County Court to defeat the probate of same, were not sustained, and such judgment was conclusive thereof, so long as it remained in force. They had the same right to rely on the conclusiveness of said judgment respecting said matters alleged by the contestants as other persons."

The facts here show that the claim of the insurance company that Hunter was alive, and that Mrs. Mettler was guilty of fraud, were settled by the judgment of this Court adverse to such contentions, before the insurance company paid into the hands of Mr. Finks the amount of the judgment, and that the respondents here obtained none of the company's funds until the alleged duty of inquiry imputed to them had been prosecuted to the very highest source and exploded.

The respondents here are not sued as trustees *ex malificio*, but there is a Texas decision, pointing the distinction between the innocent taker, such as was shown in the Holley case above and here, who disburses the funds which his adversary is endeavoring to trace before notice is given of the adverse claim, and the wrongful taker, who by his transfer puts it out of the power of the real owner to follow the funds.—Schneider vs. Sellers, 98 Texas, 380 (390), and the holding is made in that case that if the title or possession of the holder is obtained in such a way as to charge the funds in his hands with a constructive trust, his transfer of same to an innocent holder will leave him liable to respond to the real owner for the injury done by him in putting it beyond the power of the owner to follow the funds, but it is said in that case, and in the authorities upon which it rests, that wrongful conduct of the party sued is an essential element of his liability, and that without such showing, he cannot be held. See also, 2 Pomeroy's Equity, Section 1051. U. S. vs. Detroit Timber & Lbr. Co. No. 106, Oct. Term, 1905, U. S. Sup. Ct.

II.

There is still another insurmountable obstacle in the way of the attempted recovery in this suit. The right of one who has paid funds under a judgment, or whose property has been sold under its process, to an order for restitution on the reversal or annulment of the judgment, is restricted to parties to the record. As against the adversary party, the Court may act; he is responsible for the suit and the entire proceeds of same, notwithstanding he may have disbursed what he received under the judgment. He may be reached, although he may have paid his attorney, his physician, or his butcher out of the proceeds. His original taking was wrongful, as between himself and his opponent, and the Court moves because of the original wrong, not because of after events. However, when a party lawfully receives the funds, his lawful act cannot without his fault become converted into a wrongful taking. The legal or moral quality of an executed transaction can not be magically metamorphosed by subsequent events. Where the funds have become once lawfully titled in an outsider, the party injured cannot follow them, and by his action make illegal that which had a lawful inception.

Winston vs. Masterson, 87 Tex., 200;
McDonald vs. Napier, 14 Ga., 89;
Little vs. Bunce, 7 N. H., 485;
Wright vs. Aldrich, 60 N. H., 161;
Florida Railway Co. vs. Bisbee, 18 Fla., 66;
Kalmbach vs. Foote, 49 N. W. Rep., 132;
Gray vs. Alexander, 7 Humph., 16;
Wright vs. Aldrich, 60 N. H., 485;
Costigan vs. Newlands, 12 Barlows' 456;
Butcher v. Henning, 35 N. Y. Supp., 1006.

III.

The complainant has proceeded throughout in the prosecution of this suit upon the theory that it was coerced into

paying off the Hunter policies. The contrary, however, is established. Any funds which it has disbursed were in a legal sense voluntarily paid. Manifestly, there was no compulsion operating upon that impalpable something known as the corporation itself, and the record is silent as to any duress of any of its officers. There is not shown even duress of property or even imminent risk of loss in that direction. It is true the judgment of this Court had determined the action at law, but that judgment was neither actually executed, nor even in a fair way for immediate execution. No mandate had issued from this Court, no execution or other process from the trial Court. The record is silent as to any funds or property of the complainant within the reach of the Circuit Court, even if process had issued. If it believed Hunter was living, and if it desired to be put in the position of making an involuntary payment, it could easily have taken the time allowed it by law for the prosecution of its search. Waiving, however, all delay, and the benefit of all means for staying the enforcement of the judgment, it speeds its funds to discharge the same voluntarily. Being a voluntary payment, made not under duress, nor under mistake of law or fact, it could not prevail in this proceeding, even if the equities of these respondents did not so greatly preponderate.

Gould vs. McFall, 118 Pa. St., 455;
Dickerson vs. Lord, 21 Ia., 338;
McDonald vs. Napier, 14 Ga., 89;
Kalmbach vs. Foote, 49 N. W. R. (Mich.), 132;
Butcher vs. Henning, 35 N. Y. Supp., 1006;
Radich vs. Hutchins, 95 U. S., 210;
Elston vs. Chicago, 40 Ill., 514;
Groves vs. Sentell, 66 Fed. Rep., 179.

IV.

The Phillips Investment Company, besides being in a posi-

tion to avail itself of all the equities attaching to the position of Mr. Clark, has an independent equity, not shared by the other parties respondent. The facts sustaining this independent equity have been already stated. They are grouped, elaborated and set out with accuracy and detail in the answer filed by the investment company, which has been set out in full in the preceding pages of this brief. Briefly stated, its position is, that it had an enforceable legal demand against Mr. Clark, upon which the hypothecation contract with it was based; that the Clerk of the Court, disbursing Mrs. . mythe's funds under the direction of Mr. Clark, required it to surrender this demand and allow it to be cancelled. That it did cancel the same and surrender it to the Clerk, and that it did so in reliance upon the faith of the judgment at law, and having neither notice nor suspicion of any irregularity in the same. That it cannot now be restored to its former position, and the pleader presents no such case as would require it after it has cancelled and surrendered its debt against Mr. Clark, to surrender now to the complainant the funds which paid off such demand. It is fundamental that equity will not move against an innocent party, when he cannot be restored to the position which he held before action taken in reliance upon an apparent state of facts, caused or at least permitted by the complaining party. If it would have equity, it must do equity.

. The complainant persists in stating its position, as involving the rules applicable to the assignment of choses in action and judgments, but, as we think, we have demonstrated, it is really seeking to follow property of the highest negotiability, to-wit: Money. The claims of these respondents have been settled and money was the medium of settlement. The transfer of interests in the cause of action did not satisfy their demands, but money satisfied them. There has been a payment and the complainant seeks to reopen the payment, and

recover, not the judgment which has been discharged, but money that has been paid in the transaction.

People's Bank vs. Bates, 120 U. S., 556; (In this case payment was made with negotiable paper, which is property possessing a lower degree of negotiability even than money).

Youngs vs. Lee, 12 N. Y., 551;

Meades vs. Bank, 25 N. Y., 143;

Padgett vs. Lawrence, 10 Paige, 170;

Struthers vs. Kendall, 47 Pa. St., 214;

Goodman vs. Simon, 20 Howard, 343.

GENERAL OBSERVATIONS.

The position of these respondents may be summed up as follows:

Being sworn attorneys of the Courts of the country, they are employed to institute and prosecute a demand, evidently valid, for monies due the beneficiary under certain life insurance policies; it appearing, whether truly or falsely, that the claim is a fair one, and the position of the debtor unjustifiable. By means of these representations they are induced to expend valuable services in reliance upon the truth of the representations made. After a three years' contest over the matter, they recover judgment for their client in Courts equipped for arriving at concrete justice. The unsuccessful debtor, finally convinced that it has causelessly contested the claim, voluntarily discharges the judgment before process issues, either from this Court or the trial Court. Under powers of attorney from the client, the attorneys' fees are paid, the balance going in due course to the client. The attorneys receive the money innocently, still believing in the integrity of their client, relying upon the affirmation of her case evidenced by the solemn adjudication of the Courts, and believing the money to be their own, innocently disburse it

without notice or even suspicion of any defect in their title to it.

If, under this state of facts, the client's case is fraudulent, all parties have been deceived—the attorneys as well as the defendant; the defendant has been caused to pay money by reason of this deceit, though it professes it was never deceived; the attorneys have been induced to pay services extending over a period of four years, and expended in the belief that the story told was true. Notwithstanding there exists no privity between the insurance company, which claims it is defrauded, and the respondents, who occupy the same position if the claim is true, the former seeks to compel the latter to make good its loss, and indulges in a moral disquisition about the iniquitous nature of fraud in general, when these innocent distributees assert their unquestioned equities.

The admission is freely made, that if the facts alleged in the bill are true, Mrs. Smythe is without justification from the standpoint of morals; but no grounds are shown for transferring the loss which now rests upon the insurance company, to the innocent respondents, who are being pursued in this proceeding. The injured party must seek redress at the hands of the author of the wrongs suffered, and ought not to bring before the Courts and subject to the expense and annoyance of litigation parties in no sense responsible for its loss.

Believing the case to be one in which the trial Court, after a full and fair hearing, has done justice, we respectfully pray the affirmance of its judgment.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH McLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.

APPENDIX.

Appellants' brief, pp. 18-23, former appeal.

The Court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn.

We might not find it necessary to deny, in the case of a man having no motive to disappear, that a jury might be allowed to find the fact of his death from a long-continued disappearance, under circumstances tending to establish the fact of imminent peril at a prior time.

In the present case, however, policies of insurance were taken out by a person with no visible means of support, which obliged him to pay $200 per annum. These policies were made payable to a sister, who did not appear to be dependent upon him. Within about thirty-five days after their delivery to him, he disappeared. There was a very apparent motive for the disappearance; for, if, without actual death, it would be accepted as an equivalent therefor, his sister, possibly he, would profit to the extent of $15,000.

The error in the proceedings in the court below consisted in the trial judge allowing the jury, despite the obvious motive to disappear, to infer death from the fact of disappearance, without calling their attention to the fact that it was quite as likely to have resulted from a desire to obtain the insurance money, as from actual death.

Would the circumstances connected with the camping at the river, the abandonment of the camp and the footmarks, have been sufficient to establish death?

If not, did the continued subsequent non-appearance for several years, where there was a motive to appear, supply any corroborative evidence?

Undoubtedly there had been an abandonment of the camp. If Hunter desired to disappear, there would have been such abandonment. The footmarks near the river, what was supposed to be an indication that a foot had slipped, and a broken mesquite root, were utterly inadequate to establish the fact of drowning, above all in a river as shallow as was the Pecos.

If Hunter had entered into a plot to collect from the defendant, through an insurance upon his life, the sum of $15,000, *by disappearing, he would have done precisely what was done in the present case.*

In no way were the jury warned of the danger of drawing a wrong inference from the facts presented because of the existence of a motive to give a false presentation and color.

All the points presented to the learned trial judge by the defendant tending to elicit such warning were refused.

He was asked (Rec. p. 33), to charge:

> "If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from, by any one, at any time since his disappearance, you will find for the defendant."

This point was refused because, as he told the jury, he had covered the same in his general charge. Testimony had been given by two witnesses, Wallace and Littler, that each had seen Hunter, identified by photographs, alive, after the alleged disappearance, one at one place and the other at another, far distant. In the general charge, the learned trial judge said (Rec. p. 117):

> "The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

There can be no doubt that the defendant was entitled to an affirmance of its point, viz., that if Hunter had been seen or heard from by any one, the verdict should be in its favor. The only justification of a refusal of the point was that it had been charged, in substance, at least, elsewhere.

In the general charge, however, the jury had been instructed that they should find for the defendant, only if they believed he had been seen by the witnesses who had testified to that fact. Two witnesses having so testified, they were practically told that if they believed one had seen him and the other had not, their verdict should not be for the defendant.

The learned judge also refused (Rec., pp. 34, 118), another point in these words:

> "The fact that it is possible or probable that the absent party was at a time and place subsequent to and different from that at which he was last seen in a place where an accident might have befallen him, will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death. Therefore, unless the jury believe from the evidence that William A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant."

Was not the defnedant entitled to have the jury told it was not sufficient to ground a presumption of death, to show that the absent party had been last seen at a place where an accident might have befallen him, but that the law required greater certainty and more satisfactory evidence, of death?

If, where last seen, Hunter was in a position of peril such as made it more probable that he had extricated himself than that he had lost his life, there was no presumption he then and there died. The jury ought to have been told, that under such circumstances, they should not draw such a presumption.

Again. The learned trial judge (Rec., pp. 34, 117), was asked to charge:

"The law presumes that the life of any person continues for seven years after the last time he was seen alive or heard from. The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living,a nd each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact at issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue—that is, the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by the certainty hereinbefore set forth, the jury should find for the defendant."

Was not the defendant entitled to demand proof of circumstances such as excluded a reasonable and moral certainty that Hunter was still living?

If shown, when last heard from, to have been in a position of peril not such as to exclude a reasonable and moral doubt that the peril resulted in his death, was the fact of his death established?

The learned trial judge (Rec., pp. 32, 117), charged thus:

"If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3d, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. * * * Absence alone cannot establsh the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. Whle the death of Hupnter s not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

We submit that this portion of the charge was inadequate, because it failed to call the atention of the jury to the fact that a motive existed for Hunter's continued absence. The nonappearance of a person having no motive to disappear, may lend corroboration to circumstances tending to prove a prior death. Such non-appearance, however, where there is such motive, affords no corroboration whatever of anything other than of a desire to materialize the motive into money.

CHARGE OF THE COURT.

"Gentlemen of the Jury: The plantiff, Jennie M. Mettler, sues the defendant, the Fidelity Mutual Life Association of Philadelphia, to recover on three policies of insurance of $5,000 each, which policies of insurance were taken out by William A. Hunter on his life. The plaintif is named as beneficiary in each of these policies of insurance.

"The plaintiff also sues to recover of the defendant association 12 per cent damages on the amount of her loss, to-wit, $15,000.00 and interest theron, together with all reasonable attorneys' fees incurred in the prosecution and collection of her claim against the defendant association. She seeks to recover 12 per cent damages and attorneys fees above mentioned under and by virtue of a statute of the State of Texas, allowing same in certain cases.

"William A. Hunter, the insured, had a right in law to insure his life in facor of his sister, Mrs. Mettler.

"It is shown by the three policies of insurance and the receipts for the premiums paid thereon, which are in evidence, that the insurance policies became effective on the 31st day of October, 1896, and continued in effect up to the 20th day of April, 1897—the premiums on the policies having been paid to that date.

"It is alleged that the insured, William A. Hunter, died on or about the 4th day of December, 1896, so that the insurance under those policies was effective at the time the insured is alleged to have died.

"In order for the plaintiff to recover in this action, it

is necessary for her to prove by a preponderance of the evidence, that her brother, William A. Hunter, is dead, and that he came to his death on or about the 4th day of December, A. D. 1896, and within the terms during which the policies of insurance ran and were effective.

"While death may be presumed from the absence, for seven years, of one not heard from where news from, if living, would probably have been had, yet this period of seven years, during which the presumption of continued life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life as submited to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence, that the person was dead.

"By 'proof to your satisfaction,' as applied in this case, is meant that when you come to weigh and balance the evidence as to the probability of Hunter's being alive or dead, your mind shall arrive at the conclusion of his death. The law is satisfied with less than a certainty, yet requires a preponderance of proof establishing the fact of his death. Death, like any other fact, can be shown by circumstantial evidence, reasonably showing that according to human experience, it is more probable that the person is dead than that he is alive.

"If from the evidence in this case you shall come to the conclusion that Hunter has been continually absent since December 3, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict. Reputation in his family on the part of his father, sisters and brothers of his death is proper evidence for your consideration, but not the opinion of anyone, and in considering the reputation which exists in his family you should consider the facts and circumstances upon which the reputation of death is founded. You should also consider the failure, if there has been a failure, of those most likely to hear from him to get any news or learn of his whereabouts since the date of his alleged disappearance, December 3, 1896. You should also

take into consideration the evidence as to Hunter's character, disposition, habits, domestic relations, circumstances of life, declarations and the immediate facts and circumstances surrounding his disappearance.

"Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to have been alive and in health at the time of his disappearance, continues to live. While the death of Hunter is not to be presumed from absence alone, it is yet a circumstance that should be taken into consideration, with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence.

"Much evidence has been introduced before you in relation to the starting of Hunter from Pecos to Mentone. You have heard in great detail the circumstances surrounding the finding of the outfit with which Hunter started on his trip from Pecos to Mentone at a point on the bank of the Pecos river, and the conditions which existed at that place. It is the theory of the plaintiff that Hunter came to his death by drowning in the Pecos River near the point where his wagon and outfit were found. You should carefully consider and weigh all the facts and circumstances which have been detailed before you in relation to the finding of his wagon and evidence in the case, in reaching your conclusion as to whether or not Hunter met his death at the time and in the manner alleged by plaintiff.

"If you come to the conclusion that Hunter met his death at or about the time alleged in plaintiff's petition as the date of his death, and in the manner therein named, to-wit: by being drowned in the Pecos River, it would be your duty to find for the plaintiff.

"It is the theory of the defendant that William A. Hunter did come to his death at the time and in the manner contended by plaintiff. Evidence of circumstances relating to his disappearance and of the condition of things found at his camp on the bank of the Pecos River have been introduced before you in support of the theory of the defendant. The evidence of witnesses is also before you

tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by witnesses who have testified to this, then of course, it would be your duty to find for the defendant.

"You are exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proven, but you will be controlled as to the law of the case by the charge of the court.

"If, under the foregoing charge, you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with 6 per cent interest thereon from December 2, 1897, which is the date on which suit was instituted in the State Court down to this date, June 2, 1900; and also 12 per cent on the total of the face of the policies and interest, as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss, and your verdict should separate the amounts found as principal, as interest and as damages, and the amount found as reasonable attorneys fees.

"In event you should find for the plaintiff, I give you for your assitance, a form for your verdict:

"'We, the jury, find for the plaintiff, and assess her damages as follows:

"'15,000.00 as principal;

"'.....as interest at the rate of 6 per cent. from December 2, 1897, to June 2, 1900;

"'$..... the sum being 12 per cent damages on the amount of $15,000.00 and interest thereon at 6 per cent.

"'$..... as reasonable attorneys' fees.'

"If under the foregoing charge your verdict should be for the defendant, you will simply say:

"'We the jury find for the defendant.'

"(Signed) Edward R. Meek, Judge."

(Rec. pp. 491-493.)

REQUESTED CHARGES.

"You are instructed to find for defendant."

"Plaintiff is not entitled to recover attorneys fees or penalty, even if you should, under other instructions given, find that plaintiff is entitled to recover on the policies."

"The law presumes that the life of any person continues for seven years after the last date he was seen alive or heard from.

"The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude to a reasonable and moral certainty the fact that such person is still living, and each fact in the chain of facts, from which the death of the party is to be inferred, must be proved by competent evidence, and by the same weight and force of evidence as if each one were the main facts in isue; and all the facts proved must be consistent with each other and consistent with the main facts in issue, that is, the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by a certainty hereinbefore set forth, the jury should find for the defendant."

"If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant."

"The fact that it was possible or probable that the absent party was, at a time and place subsequent to and different from that at which he was last seen, in a place where an accident might have befallen him, will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death.

"Therefore, unless the jury believe from the evidence that W. A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life, than that he extricated himself from such perilous position alive, you must find for the defendant."

"A warranty is a stipulation in writing in the policy, or

a condition thereon endorsed on the truth of fulfillment of which the entire contract depends. Such stipulation may be on the face, margin or back of the policy, and whether it be material to the risk is not a question for the jury to consider.

"Therefore the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued, and are herein involved, was at the time he made such application, both a farmer and a real estate agent, and unles you so believe, you will find for the defendant." (Rec., pp. 488, 489, 490.)

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No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

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FILED
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No. 25

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY,
APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELLES' MOTION TO DISMISS APPEAL OR AFFIRM.

ALEXANDER & THOMPSON,
MCLAURIN & WOZENCRAFT,
SPOONTS, THOMPSON & BARWISE,
ETHRIDGE & BAKER,
Solicitors for Appellees.

No. 19771

Supreme Court of the United States

OCTOBER TERM, 1905

No. 270

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON AND PHILLIPS INVESTMENT COMPANY, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELLES' MOTION TO DISMISS APPEAL OR AFFIRM.

TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Now come Appellees herein, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company, by their solicitors and move the Court to dismiss the appeal herein of The Fidelity Mutual Life Insurance Company, Appellant,

and for specification of the grounds urged in this behalf, these Appellees respectfully show:

FIRST.

This Court is without jurisdiction to hear and determine this appeal, for that it manifestly appears from the records herein, that if the Constitution of the United States was in any manner involved in this cause in the Circuit Court, or is in any manner involved in this Court, same touches and concerns an issue as to the jurisdiction of the Circuit Court, and that jurisdiction alone was drawn in question thereby, and was decided in appellant's favor in the Circuit Court, and therefore this Court has no jurisdiction.

SECOND.

This Court is without jurisdiction in this behalf, for that it manifestly appears from the record herein, that appellant invoked and sustained the jurisdiction of the Circuit Court solely on the ground of diversity of citizenship, and therefore should have appealed to the Circuit Court of Appeals for the Fifth Circuit of the United States.

THIRD.

In order to give the Supreme Court jurisdiction from the Circuit Court on a federal question, it must appear that the suit is one in which the question was really involved in the rendition of the judgment complained of, and that the question was controlling or at least material.

FOURTH.

The fact that the suit was brought to vacate a former judgment at law in the same court does not give this Court jurisdiction.

FIFTH.

The party defeated on the final judgment in the Circuit Court must elect whether he will go direct to the Supreme Court on the question of its jurisdiction alone or to the Circuit Court of Appeals on the whole case.

SIXTH.

There should be an assignment or specification of error embracing and complaining of the ruling of the Court below on the question presented to give this Court jurisdiction. The question is not certified to this C

STATEMENT.

On December 2, 1897, Mrs. Jennie M. Mettler, a *feme sole*, now Mrs. Smythe, filed suit against the appellant, The Fidelity Mutual Life Insurance Company, then named The Fidelity Mutual Life Association of Philadelphia, in the District Court of Dallas County, Texas, at Dallas, on three policies of life insurance, each for the sum of Five Thousand Dollars ($5,000), on the life of her brother, W. A. Hunter. On January 4, 1898, appellant removed the cause to the Circuit Court of the United States for the Northern District of Texas, at Dallas. The trial of said cause in said Circuit Court resulted on June 2, 1900, in a verdict of the jury in favor of said Mrs. Mettler against appellant and judgment was duly entered therein by the Circuit Court on July 4, 1900, in her favor for Twenty-one Thousand, Five Hundred and Fifty Dollars ($21,550.00). Appellant's motion as amended, for a new trial was duly heard and overruled by the Circuit Court on June 25, 1900.

Thereafter, appellant, then the defendant, sued out a writ of error direct from the Circuit Court to the Supreme Court of the United States for the re-

vision of said judgment. Said cause was heard by the Supreme Court as No. 165 of its October Term, 1901, and on May 5, 1902, the judgment of the Circuit Court was affirmed by the Supreme Court. (Fidelity Mutual Life Insurance Company vs. Mettler, 185 U. S. 308). Thereafter, on June 2, 1902, before the return of the mandate from the Supreme Court to the Circuit Court, the defendant company (here the appellant) paid into the registry of said Circuit Court in satisfaction of said judgment the sum of Twenty-four Thousand and Twenty-eight Dollars and twenty-five cents ($24,028.25), by its check marked, "in full of judgment in the case of Mettler vs. Fidelity Mutual Life Insurance Company." Thereafter, on the next day, after paying out certain portions thereof to her attorneys for the legal services they had rendered her in the case, or their order, plaintiff withdrew the remainder from the registry of the court, all such disbursements being made upon checks duly issued by the Clerk of the Court and countersigned by the Circuit Judge. (Tr. 181, 213, 216).

On May, 19, 1903, appellant, as plaintiff, filed this suit in equity in the Circuit Court for the Northern District of Texas, at Dallas, against Mrs. Jennie M. Smythe, formerly said Mrs. Mettler, and James N. Smythe, her husband, *pro forma*, and said William H. Clark, Charles A. Culberson, Morris A. Spoonts and Phillips Investment Company, defendants, asking, (1) to restrain said defendants from making use of said judgment at law recovered by Mrs. Mettler as the basis of a plea of res adjudicata in any proceeding brought to reclaim the money paid by it in satisfaction of said judgment as aforesaid, and (2) to obtain a decree against each of said defendants who had

received said money paid by it in satisfaction of said judgment, as aforesaid, for the several amounts so received by each of them. (Tr. 1-21, 30-34 and 73-76).

Appellees, then defendants, Clark, Culberson, Spoonts and Phillips Investment Company, presented a general demurer and specially demurred to appellant's original bill for the following reasons, to-wit: (1) because the averments of the bill did not make or state such a case as entitled complainant to the equity jurisdiction of the United States Circuit Courts under the Seventh Amendment to the Constitution of the United States; (2) because neither of these defendants are therein charged with any fraud, conspiracy, want of good faith, or other illegal act; (3) because it appears that the fraud charged against Mrs. Mettler was the material issue of said former suit; (4) because it does not appear that they or either of them are necessary or proper parties to said bill of complaint. (Tr. 20).

The Court sustained appellees said second and fourth demurrers and over-ruled the others; thereupon appellant obtained leave of the court to file its amended bill (Tr. 29) and all of the defendants answered thereto. The case was heard and determined upon the amended bill and the answers and full evidence and resulted in a decree (Tr. 88) against the appellant as to appellees, but in its favor as to Mrs. Mettler, and appellant now appeals direct to this court as to appellees. Appellees, Clark, Culberson and Spoonts, were Mrs. Mettler's attorneys in her action at law, and the money received from her by them from the proceeds of said judgment collected by her was received innocently by them and constituted their fees for the professional work and services rendered her in said case.

We quote the following from the learned Judge's statement of his conclusions upon the trial of the present suit:

"As to the defendants, other than the Smythes, "it is admitted by the complainant that each of them "was without knowledge and innocent of the fraud "which was being perpetrated on the insurance com- "pany in the suit at law. The defendants, William "H. Clark, Charles A. Culberson, and Morris A. "Spoonts, were attorneys retained by the plaintiff, "Jennie M. Mettler, at various stages in the suit at "law to represent her before the courts in the prose- "cution of her claim against the insurance company. "They and each of them, performed legal services in "the prosecution of her alleged claim, and in contem- "plation and consideration of such services received "a substantial part of the proceeds of the judgment "in the case at law after it was paid into the registry "of the Court. Here the judgment was fully satisfied "by payment. The complainant seeks to follow the "proceeds of the judgment into the hands of parties "who received it innocently and in payment for services "rendered. The record discloses that the money "was innocently received by the attorneys and inno- "cently expended by them; and I can not find any "principle, either in law or equity, which, under the "circumstances, will compel, restitution from them." (Appellants Brief, p. 25.)

Appellant's counsel, on page 100 of its brief filed herein, makes the following admission:

"In all that they did relative to the prosecution "of Mrs. Mettler's suit against the Insurance com- "pany and in accepting compensation therefor, "Messrs. Clark, Spoonts and Culberson were acting "in entire good faith, believing that Hunter was

"dead, and that their client had a legitimate cause of "action".

JURISDICTIONAL QUESTION.

On pages 61 and 62 of its brief, appellant presents the jurisdictional grounds relied on by it to give this court jurisdiction, in a manner as of course, as follows:

"All the defendants made parties to this appeal "questioned the jurisdiction of the Circuit Court to "entertain the suit on the ground that such juris- "diction was denied to it by the 7th Amendment to "the Constitution of the United States. The decisi- "on of the Circuit Court was against the defendants "and in favor of the plaintiff upon this point. Sec. "5 of the act of March 3, 1891, provides for a direct "appeal from a Circuit Court to this Court in any "case that involves the constitution of the United "States. The Statute does not make it an essential "element of the right of direct appeal to this court "that the decision of the Circuit Court upon the con- "stitutional question should have been adverse to the "appellant. It is sufficient that the construction or "application of the constitution be involved in the case".

Circuit Court:—As stated on page 2 of its brief appellant invoked and obtained the jurisdiction of the Circuit Court solely because the requisite diversity of citizenship existed and because in its nature the suit was ancillary to the orignal action at law in that court. Appellees are not complaining of the jurisdiction of the Circuit Court, but upon the bill and answers and evidence tried the case on the facts in that court.

SUPREME COURT.—The question which appellant seeks to get this court to hold gives it jurisdiction of this appeal is stated by it (Brief p. 62), as follows: "The "question to be considered is whether the Circuit "Court and this court are *deprived* of jurisdiction to "entertain the plaintiff's bill by the last clause of the "7th Amendment to the Constitution of the United "States, which reads as follows: 'And no fact tried "by a jury shall be otherwise re-examined by any "court of the United States than according to the "rules of the Common Law.'"

Instead of its being whether the Circuit Court was "deprived of jurisdiction" by the 7th Amendment, appellant seeks to *give* this court jurisdiction by raising this question itself against appellees' consent, who have tried the case with appellant on its merits and are satisfied with the jurisdiction (Circuit Court) invoked by it as aforesaid.

Appellant's specification of errors, brief page 27, do not involve any Federal question, being in substance, as follows:

The court erred in decreeing that the plaintiff take nothing by its suit against the defendants, (1) Clark, (2) Culberson, (3) Spoonts, (4) Phillips Investment Company and (5) in refusing against them the relief prayed for in its bill.

ARGUMENT.

MAY IT PLEASE THE COURT:

Appellant successfully invoked the jurisdiction of the Circuit Court, on the ground of diversity of citizenship; its complaint embracing no question of federal constitution, law or treaty; and the Circuit Court, having tried said suit on its facts and merits and rendered judgment against appellant, and in

favor of appellees, appellant now questions the jurisdiction of said Circuit Court to give this court jurisdiction. In order to bring an appeal from the Circuit Court direct to this court, since the Judiciary Act of March 3, 1891, within the 1st of the six classes of cases specified in Sec. 5, of that act, towit: "In any case in which the jurisdiction of the court is in issue," the *jurisdiction of the Circuit Court must have been in issue in the case, and must have been decided against the appellant.* It is expressly so held by this court in Carey v. H. & T. C. Ry. Co., 150 U. S. 170. Whenever the jurisdiction of the Circuit Court is questioned, and the jurisdiction is sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff who has invoked and sustained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it to this court. U. S. v. Jahn, 155 U. S. 109.

By the 6th Section of the Act of March 3, 1891, it is provided, as follows: "The judgments or "decrees of the Circuit Court of Appeals shall "be final in all cases in which the jurisdiction is "dependent entirely upon the opposite parties to "the suit or controversy being aliens and citizens of "the United States or citizens of different States."

The jurisdiction of the United States Circuit Court having therefore been invoked and acquired entirely on the ground of diversity of citizenship by appellant, it should have appealed to the Circuit Court of Appeals of the United States and not to this court. This court has frequently so construed said 6th Section.

Florida Railway v. Bell, 176 U. S. 321, p. 325.
Muse v. Arlington Hotel Co., 168 U. S. 430, 436.
Company v. Turck, 150 U. S. 138.
Borgmeyer v. Idler, 159 U. S. 408.
Ex parte Jones, 164 U. S. 691.
Loeb v. Trustees of Columbia Township, 179 U. S. 472, p. 477.

In Florida Railway v. Bell, *supra*, the Court hold:

"In order to maintain our jurisdiction it must "appear that the jurisdiction of the Circuit Court was "not dependent solely upon the opposite parties be- "ing citizens of different states. This question must "be answered upon an inspection of the declaration "of the plaintiffs in the Circuit Court. Does it dis- "close that the plaintiffs invoked the jurisdiction of "the Court because the parties were citizens of dif- "ferent states, or because the case was alleged to be "one arising under the Constitution, laws or treaties "of the United States?" We submit, that it is very clear that the case at bar is not a case arising under the constitution, laws or treaties of the United States, but was dependent solely upon diversity of citizenship.

In order to give the Supreme Court jurisdiction direct from the Circuit Court on a constitutional question, it must appear that the suit is one in which the question was really involved in the rendition of the judgment complained of, and that the question was controlling or at least material. Carey v. R. R. Co., 150 U, S., 170; Muse v. Arlington Hotel Co., 168 U. S., 430; In re Lennon, 150 U. S., 393; Ansbro v. U. S., 159 U. S. 695; Lampassus v. Bell, 180 U. S. 276; Water Co. v. Newburyport, 193 U. S.

561; W. U. T. Co. v. Railway, 178 U. S. 239; McCoin v. Des Moines, 174 U. S. 168; New Orleans v. Benjamin, 153 U. S. 411.

The fact that the appellees did demur to appellant's bill in the Circuit Court on the ground that plaintiff is not entitled to the equitable relief sought on account of the provisions of the 7th Amendment to the Federal Constitution, plaintiff having invoked the jurisdiction of the Circuit Court solely because of diversity of citizenship, the demurrer being overruled by the Circuit Court in chambers, and the defendants then answering and trying the case on its merits and recovering a decree in their favor unmixed with said constitutional question, will not give the Supreme Court jurisdiction of this appeal direct from the Circuit Court, under the 5th section of said Judiciary Act, as contended by appellant. In Muse v. Arlington Hotel Co., *supra*, the complaint, as amended, stated that plaintiff would "rely upon the following written evidence of their title for the maintenance of the action," and enumerated among them, "the 3rd article of the treaty between the United States and the French Republic of April 30, 1893," and "the 5th Amendment to the Constitution of the United States;" and the court say: "The jurisdiction of "the Circuit Court was invoked on the ground of di- "verse citizenship and not on the ground that the "case arose under the Constitution or laws of the "United States, or treaties made, or which shall be "made under their authority. And it is settled that "in order to give the Circuit Court jurisdiction of a "case as, so arising, that it does so arise, must appear "from the plaintiff's own statement of his claim. If "this case had been taken to the Circuit Court of Ap- "peals the decision would have been final under the

"6th Section of the Statute, and it might well be "concluded that therefore the writ of error would not "lie under the 5th Section."

"In respect of plaintiff's case as stated in the "complaint, the Circuit Court decided no question as "to the application or construction of the Constitu- "tion or the validity or construction of the treaty.— Writ of Error dismissed."

The fact that this suit was brought in the Circuit Court to vacate the judgment of the same court in the law case does not make this a suit arising under the Constitution, or laws, or treaties of the United States, or give this court jurisdiction.

Carey v. Railway, 150 U. S. 170.
Metcalf v. Watertown, 128 U. S. 586.
Pope v. Railway, 173 U. S. 573.

That the party defeated on final judgment in the Circuit Court must elect whether he will go to the Supreme Court on the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case, is true, as decided in McLish v. Roff, 141 U. S. 661.

To give jurisdiction to the Supreme Court under the Fifth Section of the Seventh Amendment, there must be an assignment or specification of error stating the error commited by the court below. As heretofore stated, appellant has no such assignment or specification of error in the record, for the good reason the court below ruled in its favor in reference to the "constisutional question" on demurrer, in chambers, before answer and trial, and appellant has no right to now import the question into the

cause to give this court jurisdiction. Ansbro v. U. S. 159 U. S. 695.

The Loeb Case

We find no decisions of this court conflicting with those cited above in support of this motion, not excepting the three cases cited on page 62 of appellant's brief in support of its contention that this Court has jurisdiction.

The only one of these three cases in which we find any expressions in the opinions which could be considered even a shadow in support of appellant's contention is the case of Loeb v. Trustees of Columbia Township, 179 U. S. 472, which we also cite in support of our second proposition; and properly considered there is nothing in the opinion in the Loeb case in support of appellant's contention.

Loeb sued the Trustees of Columbia Township in Hamilton County, Ohio, upon bonds issued by the Township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits, which bonds were issued in virtue of an Act of the General Assembly of Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the Township,—a general demurrer.

This general objection was sustained and, the plaintiff electing not to plead further, judgment was rendered for the defendant, and the case was brought direct to this court by writ of error.

The record contained in full the opinion rendered and filed by the Circuit Court when disposing of the case, and shows that the judgment was rendered

against the plaintiff in error on the ground that according to the principles laid down in Norwood vs. Baker, 172 U. S. 269, said Act of Ohio, under which the bonds sued on were issued, was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States forbidding a state to deprive any person of property without the due process of law.

The very foundation of Loeb's cause of action involved the validity of said Ohio Act plead in his petition or declaration, the full provisions of which it was the duty of the Circuit Court to take judicial knowledge of, and to pass upon its validity, and the Court holding the Ohio Act repugnant to the federal Constitution, judgment was rendered by it against the plaintiff. That is to say, the Loeb case was embraced in the Fifth Section of said Judiciary Act of March 3, 1891, providing that appeals or Writs of error may be prosecuted direct to this Court from the Circuit Courts, "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." In other words, in the Loeb case the jurisdictional question was whether the Circuit Court erred in rendering judgment against him on the ground that said Ohio law, which was the basis of the bonds sued on, was in contravention of said constitutional provision; and therefore, came within the plain letter of the Fifth Section quoted above from said Judiciary Act, and gave this Court jurisdiction in that case.

In conclusion, as the Constitution makes the express distinction between jurisdictions at law and in equity, the point raised by appellees' demurrer in virtue of said Seventh Amendment is necessarily in-

volved in every general objection to the equity jurisdiction of the Circuit Court.

It is not a question of the right of trial by jury, but of whether the case is one in equity, as the distinction between law and equity was established at the time of the adoption of the Constitution.

In Senator Culberson's answer said Seventh Amendment is pleaded, but this was entirely immaterial, as any point made thereon was equally available under his demurrer and had been decided by the Circuit Court in over-ruling his demurrer.

If this court takes jurisdiction in this case on appeal, because of a "constitutional question" being involved, it seems that the court will be taking jurisdiction in all the equity suits where the jurisdiction in equity is raised in the Circuit Courts by the demurrers.

PRAYER.

The premises considered, appellees pray that this Honorable Court do sustain this motion; and by its judgment in this behalf direct, that this appeal does not lie, and that the same be dismissed, or the judgment affirmed, and accordingly, they will ever pray.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH MCLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.

No. 19771

Supreme Court of the United States

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JAMES H. McKENNEY

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Appeal from the Circuit Court of the United States for the Northern District of Texas.

APPELEES' ARGUMENT ON MOTION TO DISMISS APPEAL OR AFFIRM.

TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Now come Appellees herein, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company by their solicitors, and in support of the motion to dismiss, file this additional argument herein:

FIRST.

This Court is without jurisdiction to hear and determine this appeal, for that it manifestly appears

from the record herein, that if the Constitution of the United States was in any manner involved in this cause in the Circuit Court, or is in any manner involved in this Court, same touches and concerns an issue as to the jurisdiction of the Circuit Court, and that jurisdiction alone is drawn in question thereby, and appellant cannot avail itself of such issue here, for that said issue was not decided against it in said Circuit Court, and for that no certificate is presented to this Court from the Circuit Court, embodying said question of jurisdiction.

SECOND.

This Court is without jurisdiction in this behalf, for that it manifestly appears from the record herein, that this case and the judgment appealed from herein does not involve in any substantial sense the construction or application of the Constitution of the United States, and for that:

1. The only respect in which said Constitution of the United States has been invoked was one touching the jurisdiction of said Circuit Court;.

2. The decision of said Circuit Court in that behalf was in favor of appellant; and

3. If it be true, as contended by the appellant, that the issue made in said Circuit Court is one which has been already settled by the decisions of this Court, then no question in that respect remains for decision, and said case did not involve the construction or application of the Constitution.

THIRD.

This Court is without jurisdiction in this behalf, for that it is manifest from an inspection of the record herein, that this cause does not fall within any

provision of the statutes of the United States, allowing appeals from a Circuit Court to the Supreme Court of the United States.

STATEMENT.

Appellant, to sustain the jurisdiction of this Court over this appeal, depends upon Subdivision 4 of Section Five of the Judiciary Act, authorizing a direct appeal to this Court from any existing Circuit Court "in any case that involves the construction or application of the Constitution of the United States." Ex parte Glaser, 198 U. S., 171.

Mrs. Jennie M. Mettler on June 2, 1900, recovered judgment in the Circuit Court of the United States for the Northern District of Texas at Dallas in the sum of $21,550.00 against Fidelity Mutual Life Association upon insurance policies issued by the latter, insuring the life of William A. Hunter, a brother of the plaintiff. This judgment being brought before this Court by writ of error was affirmed on May 5, 1902. (Fidelity Mutual Life Association v. Mettler, 185 U. S., 308.) Without waiting for issuance of Mandate, the insurance company paid into the Registry of the Circuit Court at Dallas, for the use of the successful plaintiff, the amount of the judgment, principal, interest and costs, and thereupon, after paying out certain portions thereof to her attorneys and to their order as their fees, plaintiff withdrew the remainder from the Registry of the Court, under appropriate orders of the Court.

On the 19th day of May, 1903, said insurance company, having in the meantime changed its corporate name to the Fidelity Mutual Life Insurance Company, filed a bill in equity in said Circuit Court against Mrs. Mettler, (who had in the meantime be-

come the wife of James N. Smythe, and who will be hereinafter referred to by that name), and against William H. Clark, Morris A. Spoonts and Charles A. Culberson, who had been attorneys for her in the law action and to whom she had paid the above mentioned funds, as their reasonable fees, and against Phillips Investment Company, to whom Mr. Clark, out of the fee earned by him in that cause, had paid a pre-existing indebtedness, independent of, and in no manner connected with said cause. The object of the bill was to vacate the judgment in the law action, upon the alleged ground of fraud perpetrated by Mrs. Smythe, the other respondents being expressly exonerated from all participation in or knowledge of said fraud; and to recover from the present appellees the several sums of money that had been paid to them out of the proceeds of the judgment, and from Mrs. Smythe the balance remaining in her hands after discharging her obligations to these appellees.

The appellant, as such complainant in said equity suit, recovered the judgment prayed for against Mrs. Smithe, and as no appeal has been taken on behalf of Mrs. Smythe, matters concerning her are not in issue here. Its bill was dismissed against these appellees on the merits upon the grounds stated by said Circut Court, and set out by appellant in its brief as follows:

"As to the defendants other than the Smythe's, it is admitted by the complainant, that each of them was without knowledge and innocent of the fraud which was being perpetrated on the insurance company in the suit at law. The defendants, William H. Clark, Charles A. Culberson and Morris A. Spoonts were attorneys retained by the plaintiff, Jennie M.

Mettler, at various stages in the suit at law to represent her before the courts in the prosecution of her alleged claim against the insurance company. They and each of them performed legal services for her in the prosecution of her alleged claim, and in contemplation of and in consideration for such services, received a substantial part of the proceeds of the judgment in the case at law after it was paid into the registry of the court. The bill of complaint and evidence in the record disclosed with particularity the manner in which each of the attorneys who are made defendants came into posession of his portion of the fund paid into court. The various assignments, legal and equitable, are set forth and proved, in order to show the interest and part each acquired under the judgment, and also to show to what extent each participated in the fund. After consideration, I have reached the conclusion, that the rule enunciated and relied upon by counsel for complainant with relation to the assignment of judgments, to the effect, that the assignee of a judgment takes it subject to all equities existing between the litigants, whether he had notice of the same, or not, has no application under the facts of this case. Here the judgment was fully satisfied by payment. Complainant seeks to follow the proceeds of the judgment into the hands of the parties who received it innocently and in payment for services rendered. The record discloses that the money was innocently received by the attorneys and innocently expended by them, and I cannot find any principle, either of law or of equity, which under the circumstances will compel restitution from them. It is true they were put on notice of complainant's claim in the suit at law, that Hunter was not dead, but living, but in the absence of corrupt knowledge on their

part that he was living, they had a right to rely upon the solemn and deliberate judgment of the court that he was dead, and so far as they are concerned, that judgment, so entered, concludes the insurance company.

"The defendant, Phillips Investment Company, is in as favorable an attitude as any the defendant attorneys. In innocently received an assignment of a portion of the judgment from the defendant Clark, as collateral security for the debt owing to it by him and it participated in the fund paid into court in satisfaction of the judgment, and surrendered its evidence of indebtedness against Clark in consideration therefor. It is quite blameless in the premises, and, as stated with relation to the attorneys who are defendants, I know of no rule, either of law or of equity which would compel the Phillips Investment Company to return what it has received under this judgment.

"The view expressed here with relation to the attitude of defendants, other than the Smythes, should have led to the sustaining of the demurrers interposed, and insisted upon by them. It now leads to the dismissal of the bill against them, with their costs, and the decree will so provide."

The appellant in its bill of complaint in the Circuit Court depended to support the jurisdiction of that court upon diversity of citizenship between it and the respondents. It also suggests, by way of argument, in its brief herein on the merits, that its bill was in the nature of an ancillary bill to the original action. That circumstance does not of course affect the jurisdiction of this appeal. (Carey v. H. & T. C. Ry. Co., 150 U. S., 179; Holmes v. Marshall, 141 U. S., 589.) The construction or ap-

plication of the Constitution of the United States was not stated to be involved.

The appellees, by demurrer in the Circuit Court, prayed for dismissal of the bill of complaint upon the ground, that under the operation of the Seventh Amendment to the Constitution of the United States, the Circuit Court as a Federal Court was without jurisdiction to grant the relief sought by complainant. The demurrer was overruled and respondents required to answer. Each respondent thereupon filed separate answer, and the respondent, Charles A. Culberson in his answer again suggested, as had been previously done by the demurrer, that no court of the United States had jurisdiction to grant complainant the relief sought, under the facts stated in the bill, and that, therefore, same should be dismissed. Because of these pleadings appellant takes direct appeal to this Court.

Testiomony was taken, submisssion had and case disposed of on grounds wholly independent of the constitutional question, and in the exercise of jurisdiction. Of the decision on the question made as to the jurisdiction of the Circuit Court, complainant could not have complained, as its contentions were sustained, and respondents, though losing their point as to the jurisdiction of the court, having obtained a decision favorable to themselves upon the merits, are not complaining.

Complainant's specifications of errors tender no issue in this Court, to the effect that the decision of the Circuit Court upon the question of the Seventh Amendment was erroneous. It contends on the contrary. in argument that the ruling was correct. Its specifications of error are as follows:

1.

The court erred in decreeing that the plaintiff take nothing by its suit against the defendant William H. Clark, and dismissing its bill of complaint as to said defendant.

2.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Morris A. Spoonts, and dismissing its bill of complaint as to said defendant.

3.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Charles A. Culberson, and dismissing its bill of complaint as to said defendant.

4.

"The Court erred in decreeing that the plaintiff take nothing by its suit against the defendant Phillips Investment Company, and dismissing its bill of complaint as to laid defendant.

5.

"The Court erred in not granting to the plaintiff the relief prayed for in its bill of complaint as against each of the defendants, William H. Clark, Morris A. Spoonts, Charles A. Culberson and Phillips Investment Company."

The Statutes Involved.

I.

Section 5 of the Judiciary Act, (U. S. Compiled Statutes, 1901, pp. 548, 549) provides in part, that appeals or writs of error may be taken from the district courts or from the existing circuit courts, direct to the Supreme Court in the following cases:

"1. In any case in which the jurisdiction of the court is in issue. In such cases the question of juris-

diction alone should be certified to the Supreme Court from the court below for decision."

Construing the quoted subdivision of Section 5, this Court has held: (1) That the question of jurisdiction may not be made the basis of a direct appeal to this Court at the instance of the party in whose favor it was decided in the trial court; and (2) that a certificate from the Circuit Court, presenting the question to this Court, is indispensable. (Courtney v. Pradt, 196 U. S. 89.)

In the case at bar, the record shows: (1) That the issue of jurisdiction was decided in favor of appellant; and (2) that no certificate from the Circuit Court, embodying the question, is presented to this Court. Therefore, if the question raised by the respondents in the Circuit Court concerns the jurisdiction of the Circuit Court, this appeal will be dismissed. That same does concern such jurisdiction, and does not touch the essential merits of the controversy between the parties, we hope to maintain to the satisfaction of this Court presently.

II.

Under Subdivision 4 of Section Five of the Judiciary Act, a direct appeal from the Circuit Court to this Court is authorized "in any case that involves the construction or application of the Constitution of the United States."

This appeal rests upon the supposed justification of the subdivision just quoted, the appellant seeking to maintain the proposition that this case does substantially involve the construction and application of the federal instrument.

It is conceded that the Seventh Amendment was invoked by the respondents; that upon that issue a

decision was had favorable to the appellant; and that the Court below rested its disposition of the case upon grounds wholly independent of the Seventh Amendment. It must also be conceded, that if the restrictions in that section of the federal compact concern the power of the Federal Courts, as such, and do not relate to primary rights of the parties litigant as such, then the case falls within the first subdivision of Section 5 of the Judiciary Act, and failing to present the indispensable prerequisites authorizing this Court to revise the judgment below, this appeal would fall.

With these preliminary observations, we respectfully submit the following:

REMARKS.

The Seventh Amendment, so far as applicable here, provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The restraint provided for in this language rests upon the Court as a federal tribunal. Its object evidently is to deprive the Federal Court of the power to re-examine cases falling within the prohibited class. No immunity of the litigant is guaranteed, except as against the action of a federal court. No primary rights, as such, either of life, liberty or property, are created or protected by the provision. State courts are left free to proceed as they may desire unaffected by the restriction. Jack v. Kansas, 199 U. S. 372.

We make a distinction between the fundamental guaranties on the one hand, such as equal protection of the laws, due process, immunity from persecution or repeated prosecutions, provisions touching security to life, liberty and property, and those provisions on

the other hand which provide for the powers which may be exercised by the courts when erected, in giving effect to the primary guaranties. The one class of rights may be enforced anywhere and under all circumstances, while the other class, operates only to grant or restrict particular courts in the exercise of jurisdiction.

The Seventh Amendment to the Constitution of the United States is of the second class of provisions, and is to be read in connection with Section 2, Article III of the same instrument. It has the effect of limiting the judicial power granted in that section. It is in effect a proviso to that section.

That the question is one touching the jurisdiction of the Circuit Court is conceded by appellant at p. 61 of its brief on the merits, as follows:

"All the defendants made parties to this appeal question the jurisdiction of the Circuit Court to entertain the suit on the ground, that such jurisdiction was denied to it by the Seventh Amendment to the Constitution of the United States, reading as follows: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.' The decision of the Circuit Court was against defendants and in favor of plaintiff upon this point.

Section 5 of the Act of March 2, 1891, provides for a direct appeal from a Circuit Court to this Court in any case that involves the construction or application of the Constitution of the United States. The statutes does not make it an essential element of the right of direct appeal to this Court, that the decision of the Circuit Court upon a constitutional question shall have been adverse to the appellant. It is sufficient that the construction or application of the Constitution be involved in the case."

And, again, at p. 62: "The question to be considered is whether the Circuit Court and this Court

are deprived of jurisdiction to entertain the plaintiff's appeal by the last clause of the Seventh Amendment to the Constitution of the United States."

If the question, however, is not simply one of jurisdiction, then it becomes our duty to suggest to the court the particulars in which the case falls without the provisions of the Fourth Subdivision of Section Five of the Act.

1.

It falls without said provisions, because the Circuit Court decided the so-called constitutional question in favor of the appellant, and therefore he may not complain.

2.

It falls without said provisions because the case below was decided upon grounds independent of the so-called constitution questions.

3.

It falls without said provisions, because the question sought to be raised thereunder was not controlling in the disposition of the case.

4.

It falls without said provisions, because the applicable statutes provide that appellant should have taken this appeal to the Circuit Court of Appeals, in which Court, had the Seventh Amendment been again invoked by appellees, same could have been certified to this Court, or, after decision of same in said Circuit Court of Appeals, revised in this Court upon certiorari.

AUTHORITIES.

Carey v. H. & T. C. Ry. Co., 150 U. S., 181.
In re Lennon, 150 U. S., 401.
Ansbro v. U. S., 163 U. S., 697.
Cornell v. Green, 163 U. S., 75.
Lampasas v. Bell, 190 U. S., 276.
Muse v. Arlington Hotel Co., 168 U. S., 430.
Corkran Oil Co. v. Amandet, 199 U. S., 182.

Three decisions of this Court are relied upon by complainant to justify the direct appeal it has taken in this cause from the Circuit Court:

Holder v. Aultman, 169 U. S., 81.
Loeb v. Columbia Township Trustees, 179 U. S., 472.
Field v. Barber Asphalt Co., 194 U. S., 618.

In each of those cases, the appellant, who had brought his case from the Circuit Court directly to this Court, had been *injurously affected* by a ruling made in the Circuit Court upon a constitutional question, and did not occupy the position in which this appellant stands of invoking the jurisdiction of this Court, upon the ground that the Circuit Court had decided the constitutional question in its favor, and thereby predicating an appeal to this Court upon a ruling of the Circuit Court, which it maintains is correct.

In the Holder case, the plaintiff sued upon contract. The defendant relied upon a statute of Michigan. The plaintiff escaped the effect of the Michigan statute by successfully maintaining its unconstitutionality, when tested by the federal instrument, and had judgment. The defendant, who had lost his case by reason of the ruling adverse to him upon the federal question, appealed to this Court, and the appeal was sustained.

In the Loeb case, the plaintiff sued upon bonds issued by the trustees of Columbia Township. The defendant demurred, making as its third point in support of the demurrer, the claim that the act contravened the provisions of the Constitution of the United States. This point was decided for the defendant, and the plaintiff, who lost his case upon the

constitutional question alone, invoked the jurisdiction of this Court and the appeal was sustained.

In the Field case, plaintiff sued to enjoin the issuance of certain tax bills, designed to provide funds for the paving of certain streets, upon several grounds: The first being that the act under which the bills were issued was in violation of the Fourteenth Amendment, and further that the proceedings had, prior to the letting of the contract upon which the bills were issued, violated the Interstate Commerce Clause of the Constitution. The Circuit Court held against him upon the federal grounds alleged, but being of opinion that his bill was maintainable in part upon other grounds, granted in part the relief sought, and denied in part that portion of the relief which depended upon the federal questions presented. Complaining that the Circuit Court erred in not sustaining the federal grounds, Field appealed to this Court, and the appeal was sustained.

It is obvious from the foregoing statement, that the authorities upon which complainant relies, do not sustain him, and the question is one to be decided in accordance with other settled principles announced in the decisions of this Court.

The complaint appears to attach undue weight and to misconstrue the language of this Court in the Holder case, which is referred to in both of the later cases of Loeb and Field, to the effect, that the jurisdiction of this Court in cases of appeals under Subdivision 4 of Section Five of the Judiciary Act, does not depend upon the question whether the right claimed under the Constitution of the United States has been denied or upheld in the court below. That language simply means what it says, to-wit: That in such case, a different rule exists from that which

obtains in writs of error from this Court to the highest courts of the State. In that class of cases, the right asserted by a litigant under the Federal Constitution must be denied before he can bring his case to this Court as involving a federal question; (Whitten vs. Tomlinson 160 U. S. 231) but in the case of an appeal or writ of error under Section Five of the Judiciary Act, an unsuccessful litigant may depend upon his case presenting the constitutional question, even though the question *was raised by his adversary* and upheld. The language quoted does not state in terms, and we believe was never intended to present the idea, that one might bring his case to this Court where the federal question, whether presented by his adversary or himself, had been decided in his favor; but was intended to guarantee him the right of bringing his case to this Court, if the federal question had been decided against him, whether it was raised by himself or by his adversary, The language of Justice Fuller at circuit in World's Columbian Exposition v. United States, 56 Fed. Rep., 666, illustrates one phase of our position:

"The ground of the decision had no reference to the construction or application of the Constitution, or the validity of the Acts of Congress in respect to that instrument, and the conclusions upon which the order was entered were unaffected by considerations of that character. Cases in which the construction or application of the Constitution is involved, or the constitutionality of any law of the Uniten States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling. Otherwise, every case arising under the laws of the United States might be said to involve the construction or application of the Constitution or the validity of such laws."

It cannot be correctly said that a case involves the construction and application of the Constitution

of the United States, when it may be disposed of correctly without deciding the federal question. Such is the case here, if the provision is not a jurisdictional provision, that is to say, if the Court has power to hear and determine a case of the general character shown by the bill of complaint, but settled principles justify a decision favorable to the defendants, without the necessity of considering the so-called constitutional question. Unless it is essential, it is not involved.

Another ground exists for denying that the federal question is involved, if the construction of the Seventh Amendment is, as appellant contends for in its brief on the merits herein. It urges in its brief, that the Seventh Amendment applies solely to appellate courts and not to the power of the Circuit Courts, and says that the question has been a settled one in this Court for almost a century. Appellant's brief p. 68 et. seq. Crim v. Handley, 94 U. S., 652.

If this Court has settled the question, or if the provision itself is clearly applicable to appellate procedure, then in no true sense was the Constitution involved when appellees raised the point below. We do not agree with appellant, that the question of jurisdiction suggested by the application of the Seventh Amendment is a settled question; but if it is settled then it is not a question.

It may be contended, that the appellees occupy inconsistent positions here and in their brief on the merits. Such, however, is not the case. We simply present the matter in an alternative way, contending in the first place that the Seventh Amendment raises a question as to the jurisdiction simply of the Circuit Court, as a court of the United States; in the second place, that if not jurisdictional, the question is one that

cannot be availed of by the party in whose favor it was decided as a ground for invoking the jurisdiction of this Court; and in the third place, that if the Court has jurisdiction, it ought to hold under the authorities, that where the case as developed shows the appellant engaged in an attempt to re-examine a question which has been theretofore examined by a common law jury, relief should be denied. These positions are are consistent; they raise the same questions in different forms.

PRAYER.

The appellees aforesaid respectfully pray, upon the submission of the motion to dismiss or affirm, that this Honorable Court will sustain same; and by its judgment in this behalf direct, that this appeal does not lie, and that this cause be dismissed, and accordingly, they will ever pray.

Respectfully submitted,

W. M. ALEXANDER,
LAUCH MCLAURIN,
GEORGE THOMPSON,
F. M. ETHERIDGE,
RHODES S. BAKER,
Solicitors for Appellees.

Supreme Court of the United States.

No. 25.—October Term, 1906.

The Fidelity Mutual Life Insurance Company, Appellant, *vs.* William H. Clark, Morris A. Spoonts, Charles A. Culberson, and Phillips Investment Company.	Appeal from the Circuit Court of the United States for the Northern District of Texas.

[October 29, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity, brought in the Circuit Court to enjoin the setting up of a judgment at law recovered in the same Circuit Court upon three policies of life insurance, on the ground that the judgment was obtained by fraud. It also seeks to compel the plaintiff in the action at law, and other parties to whom interests in the policies were assigned, to repay the sums which they received upon them. The judgment was rendered in a case which came before this Court, and the dramatic circumstances of the alleged death are set forth in the report. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308. The appellant is the plaintiff in error in that case, having changed its name. After the date of the judgment the appellant discovered that Hunter, the party whose life was insured, was alive, and that the recovery was the result of a deliberate plot. Thereupon it forthwith brought this bill. One of the defences set up and argued below and here was that by the Seventh Amendment to the Constitution no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law. On the facts alleged and proved the Circuit Court entered a decree against the plaintiff at law, Mettler, now Smythe, but dismissed the bill as against the assignees of partial interests in the policies. The Insurance Company appealed to this Court.

The material facts are these. By way of a contingent fee for the services in collecting the insurance, Mrs. Mettler assigned to the present defendant Clark and his partners one-third interest in the policies, with an additional sum in case statutory damages and attorney's fees were recovered. This afterwards came to Clark alone. Clark and Mrs. Mettler assigned five hundred dollars each, from their respective interests, to the defendant Culberson, as a contingent fee for argument and services in this Court. Clark also employed the defendant Spoonts, it would seem, on a contingent fee.

Finally he mortgaged his right to the Phillips Investment Company. When the judgment was recovered, before execution, the Insurance Company paid the amount ($24,028.25) into Court. Out of this the clerk paid to Mrs. Mettler $11,616; to Clark, $8,346; to Spoonts on Clark's order, $1,500; to Culberson, $1,026, and to the Phillips Investment Company, $1,540.24. It is these sums, other than that paid to Mrs. Mettler, that are in question here.

It will not be necessary to consider the constitutional question under the Seventh Amendment, to which we have referred, or some other questions which were raised, because we are of opinion that the appellees are entitled to keep their money, even if the judgment can be impeached for fraud. They all got the legal title to the money which was paid to them, or, what is the same thing, got the legal title transferred to their order. That being so, the appellant must show some equity before their legal title can be disturbed. It founds its claim to such an equity on the mode in which the judgment which induced it to part with the title to its money was obtained. But fraud, of course, gives rise only to a personal claim. It goes to the motives, not to the formal constituents of a legal transfer, *Rodliff* v. *Dallinger*, 141 Mass. 1, 6, and the rule is familiar that it can affect a title only when the owner takes with notice or without having given value. *Fletcher* v. *Peck*, 6 Cranch, 87, 133. 2 Williams, Vendor & Purchaser, 674. See *The Eliza Lines*, 199 U. S. 119, 131. The question is whether the appellant can make out such a case as that.

It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly can be said to be part of the appellees' title. It simply afforded the appellant a motive for its payment into Court. The appellees derive their title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the twenty-four thousand dollars in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

The notice to be shown is notice of the fact that the judgment which induced the appellant's payment was obtained by fraud. But notice cannot be established by the mere fact that while the appellees held an interest in the policies only they were assignees of choses in action, and took them

subject to the equities. That is due to a chose in action not being negotiable. It does not stand on notice. The general proposition was decided in *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 333, 334, and *United States* v. *Clark*, 200 U. S. 601, 607, 608, and earlier in *Judson* v. *Corcoran*, 17 How. 612, 615, and, we have no doubt, is the law of England. Of course the assignee of an ordinary contract can only stand in the shoes of the party with whom the contract was made. In the discussions of the rule which we have seen we have found no other reason offered, as no other is necessary. But the assumption of the good faith of the assignee occurs in more cases than one.

The principle which we apply is further illustrated by the priority given to the later of two equitable titles, if the legal title be added to it, 2 Pomeroy, Eq. 3d ed. §§ 727, 768 by the doctrine of tacking, and, in some degree, by the great distinction recognized in other respects between the holder of title under an executed contract and a party to a contract merely executory. See 1 Williams V. & P. 540, and cases cited. We may add further that, even if we were wrong, the equities to which an assignee takes subject are equities existing at the time of the assignment, 1 Williams V. & P. 584, and that the notice with which he is supposed to be charged as assignee can be of nothing more. Therefore merely as assignees the appellees had not notice of the as yet unaccomplished fraud in obtaining the judgment. The policies were honest contracts and it was an interest in the policies which was assigned, at least to Clark.

The appellant is driven, therefore, to contend, as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the Insurance Company had accepted the result by paying the money into Court without waiting for an execution, it would be impossible to say that the supposed notice was not purged. The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See *Bank of the United States* v. *Bank of Washington*, 6 Peters, 8, 19.

Decree affirmed.

Mr. Justice HARLAN and Mr. Justice WHITE dissent.

Mr. Justice MCKENNA took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.